Case and Comment

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The Trial of Sir Walter Raleigh

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BUT few events in history have been as momentous as the trial of Sir Walter Raleigh. To his brave soul every lover of justice owes a debt which can never be repaid. He was a true knight errant, for he battled against principalities and powers, and by his boundless courage made life nobler and more precious for every man, woman, and child who has followed after him.

Born of rather ignoble parentage, he entered Oxford at fourteen. At seventeen he was a soldier of fortune, fighting with the Huguenots in France. At twenty-one, a voyager in the new world. At thirty, the closest friend and favorite of England's greatest Queen. At thirty-two he was a knight, receiving from the Queen's royal concessions an income of $30,000 a year. The same year he was granted the title to all the lands lying between Savannah, Georgia, on the south, Philadelphia on the north, the Atlantic on the east, and the Pacific on the west. At thirty-three he was vice admiral in the English Navy and sailed with Sir Francis Drake. At thirty-four he was a member of Parliament. At thirty-six he was captain of the Queen's guard. Such was his early brilliant career.

But, alas! After the death of Queen Bess his fall was as rapid as had been his rise. At fifty he was charged with treason. At that time a great plague was sweeping over London. Men, women, and children were dying everywhere, and some remained unburied in the streets. The judges fled to Winchester, while Raleigh remained a prisoner in the Tower of London.

James I. had succeeded Elizabeth. He was the son of Mary Queen of Scots. His father was Lord Darnley. Elizabeth beheaded Mary. This was enough, and James, ignorant, suspicious, and cruel, determined at once to punish all the friends of his predecessor. It was charged in an indictment that Raleigh had conspired with Lord Cobhan to overthrow James and seat Arabella Stuart, a niece of Lord Darnley, upon the throne of England. Cobhan was a dissolute, unprincipled adventurer, who at this time was a prisoner in the Tower of London.

The trial of Raleigh began November 17, 1603, at Winchester. Eleven judges presided. Among them were Lord Chief

Justice Popham, Lords Cecil, Howard, and Anderson. Cecil had long been a bitter enemy of Raleigh. There was a jury of twelve men; four were knights, four esquires, and four gentlemen. The great Sir Edward Coke was attorney general. When the case was called for trial, Coke began an impassioned speech against Raleigh, addressed to court and jury. Raleigh frequently interrupted this speech, demanding that he be allowed counsel to make reply. This was scornfully refused by the court, speaking through the Chief Justice.

At the close of the first day, no evidence having yet been taken, the judges were of the opinion that the jury manifested some sympathy for Raleigh, and this jury was thereupon summarily dismissed. The next morning a new jury was in the box. When Raleigh was asked if this jury was satisfactory, he replied: "They are all Christians and honest men, and I except none."

Sir Edward Coke then began a new speech to the new jury. This probably was the most damnable and traitorous speech that was ever uttered in a court trial, and preserved for future generations. Turning to the prisoner, he said in thundering tones: "Thou art the most notorious traitor that ever came before the Bar. Thou art a monster with an English face and a Spanish heart." Raleigh many times arose and said: "Let me answer." But the thundering reply came back from Coke: "Thou shalt not!"

When the speech was ended, Coke offered in evidence a written statement, purporting to be signed by Cobhan, accusing Raleigh of conspiring with him to overthrow the government. Raleigh objected to this, insisting: First, that an accusation must be signed and acknowledged by at least two witnesses; and second, that every person accused of a crime must be brought face to face with his accuser.

Under Edward III., Parliament passed a law which provided that any accusing statement offered in evidence in a capital case must be signed and acknowledged by at least two witnesses. During the reign of Mary, Parliament passed another law which provided, in effect, that in a trial for treason the King was bound neither by rules of evidence nor by precedent. The judges held, with Coke, that the act of Edward was repealed by the subsequent act of Mary. When Raleigh demanded that Cobhan be brought before him to give his testimony, Chief Justice Popham said: "Sir Walter, you are a very witty man, but if the principle for which you contend should be allowed, the foundations of the Kingdom would be shaken and the vilest treason go unpunished." Raleigh replied to the Chief Justice: "Unless this principle is allowed, not only will the foundations be shaken, but the Kingdom itself will soon be destroyed."

Lord Cobhan had made eight different statements concerning his relations with Raleigh. In some he freely admitted his own guilt, and joined Raleigh with him as a co-conspirator. In one he denied both his guilt and that of Raleigh. In another he admitted his guilt, but denied that of Raleigh. He was a brother-in-law of Lord Cecil, one of the judges then sitting in the case. During the trial Cecil frequently consulted with Cobhan in the Tower of London, and brought back to the court statements which Cobhan was supposed to have made to him. During the reign of Elizabeth, Cecil was in disfavor, and upon the accession of James, he sought by every means to secure the favor of the King. For this reason he was determined upon the destruction of Raleigh. When the latter offered in evidence one of Cobhan's statements, in which he was declared innocent, the offer was refused on the ground that a witness, having once testified, could not thereafter be permitted to change his testimony.

At one time before the trial Raleigh wrote a note to Cobhan, and concealed it in an apple. He then bribed one of the jailers to throw the apple through the grated bars of Cobhan's cell. The note was a pathetic plea to Cobhan to tell the truth and free Raleigh. Cobhan replied by written statement, in which he declared that Raleigh was entirely innocent of the charge against him. The court refused to receive this evidence.

When the Crown rested its case, Raleigh argued that he must be discharged because only one witness had testified against him, and under an ancient law, which had come down through centuries, one witness could prove nothing. The court had anticipated the objection, and had put in evidence the written statements of two other witnesses. These witnesses knew nothing of the facts, but at some previous time had conversed with Cobhan, and testified only to what Cobhan had told them.

The court overruled the objection, and affirmed an old rule of law which provided that where one witness knew the fact and had told what he knew to another person, this other person might testify in corroboration of the first witness. Raleigh objected strongly to such evidence as hearsay. Throughout the entire trial the prisoner repeatedly urged that his accuser be brought face to face with him, saying on several occasions that if Cobhan when so brought should repeat his accusation, then he, Raleigh, was ready to die, and would offer no fur-

Photo by Boston Photo News Co.

SIR WALTER RALEIGH
From Painting in National Portrait Gallery, London

ther objection to his execution. However, not a single witness testified in open court against him. At the close of the evidence, Coke began his final argument, which for bitterness and hate has seldom been equaled in any court. He said, among other things: "I confess before God that I never knew a clearer treason than this." Then turning to Raleigh he said: "Thou art the most vile and execrable traitor that ever lived. I have not words to express such a viperous treason. Thou are a damnable atheist and a spider of Hell."

Raleigh replied in a speech of some length, and closed by saying: "Your words cannot condemn me. My innocence must be my defense."

His speech was frequently interrupted by Coke, who declared that the King demanded that his enemies be speedily punished. The jury was out only fifteen minutes; then returned with a verdict of guilty.

Immediately the Lord Chief Justice began a long speech addressed to the prisoner. This was but little less cruel than that of Coke. He concluded with the sentence of the court, which was as follows:

> "The judgment of this court is that you shall be had from hence to the place whence you came, there to remain until the day of execution, and from thence you shall be drawn upon a hurdle through the streets to the place of execution, there to be hanged, and cut down alive, and your body shall be opened, your heart and bowels plucked out, and your privy members cut off and thrown into the fire before your eyes; then your head to be struck off from your body and your body divided into four parts, to be disposed of at the King's pleasure, and may God have mercy on your soul."

Immediately thereafter Raleigh was carried back to prison. He was kept at Winchester for one month, expecting every day to be led forth to execution. But day after day, month after month, and year after year rolled on, until fourteen years had elapsed, through all of which he was confined in the London Tower. During this time he wrote his famous history of the world, and many other works of lesser note. At the end of the time, James desired to send him in quest of some rich gold mines in the new world, concerning which Raleigh had made some charts on a former voyage. For this purpose he was released and soon thereafter sailed for America. His mission was a failure, due to the treachery of James, who gave copies of these same charts to Spanish voyagers, and they arrived at the mine just ahead of Raleigh.

On his return to England he was arrested and thrown into the Tower. James was now determined on his death. The court was in a dilemma: How was Raleigh to be brought before it and resentenced upon the old conviction? Coke thereupon suggested that the only way by which this could be done was to bring him by a writ of habeas corpus. This was done. Raleigh pleaded a pardon, claiming that by reason of his having been granted a commission by the King to make the voyage to America he was pardoned, and could not now be punished for the former offense. This question was referred by the court to an eminent commission, consisting of Lord Coke, Archbishop Abbott, and Sir Francis Bacon. After a short hearing they decided that Raleigh was worthy of death, and ordered that he be executed on the following morning, in accordance with the sentence,—now more than fifteen years old. On the following morning, October 28, 1618, he was led to the scaffold. When someone objected as he laid his head on the block, that his head should be toward the east, he replied: "It matters not, so long as the heart is right." He ran his fingers over the sharp edge of the ax, and said: "It is a sharp medicine, but it will cure me of all my diseases." After his head was severed, his executioner lifted it and showed it to the multitude, then sent it, as a present, to Lady Raleigh. She embalmed it and thereafter kept it preserved in a glass case for twenty-nine years.

Nearly all the actors in this tragedy came to grief. Coke, who was so eager to secure the favor of his King, soon fell into disfavor and was removed from office in disgrace. Soon thereafter he was tried, convicted, and sent to the Tower, where he spent nine months in

meditation. He then wrote his Fourth Institute, in which he declared that he was wrong in the Raleigh trial, and that the act of Edward III. requiring two subscribing witnesses to an accusation had not been repealed by the act of Mary. Shortly thereafter Parliament, by a resolution, reaffirmed the act of Edward III. and declared that it had never been repealed.

Cobhan was convicted of treason and confined in the Tower until his death, fifteen years later.

Lord Howard spent six years in the Tower on a charge of treason.

Sir Francis Bacon, after becoming Lord Chancellor, was accused of accepting bribes from litigants whose cases were before him. Twenty-eight separate charges of receiving money or other emoluments were made. He at first strenuously denied his guilt, but after he learned of the evidence against him, pleaded guilty and wrote a letter, in which he said: "I do confess that I find matters sufficient and full, both to move me to desert the defense, and to move your Lordships to condemn me." He was sentenced to the Tower for life and ordered to pay a fine of $200,000. He was also expelled from Parliament, and forever denied the right to hold public office.

Arabella Stuart was confined in the Tower until her death.

This trial is of abounding interest to every lawyer. It had more to do with establishing two great fundamental principles of the law than any other trial of ancient or modern times. These were:

(1) That more than one witness is necessary to prove the guilt of one charged with treason.

(2) That the accused must be brought face to face with his accuser.

Nothing is more interesting than to study the growth of a legal principle. How have the courts in times past measured the weight to be given to the testimony of men? When Moses led his people into the wilderness they murmured among themselves. They had been slaves so long that they were ignorant, selfish, and filled with hate. The problem that presented itself to Moses was: How can such a people be led out of their bondage into freedom, out of ignorance into knowledge, out of selfishness and hate, to become a liberty-loving, patriotic people? This was not only Moses' problem, but it has been the problem of every leader of every race and nation since his day. Moses met it by bringing to them the Ten Commandments, which made up the greatest charter of liberty ever given to mankind. He likewise brought to his people many other laws. Among them was this one: Deuteronomy, chapter 17, verse 6: "Out of the mouth of two witnesses or three witnesses shall he who is worthy of death be put to death, but out of the mouth of one witness he shall not be put to death." And in Numbers, 35th chapter, 30th verse, he said: "One witness shall not testify against any person to cause him to die."

Josephus thus quotes some of the ancient laws of the Hebrews: "But let not a single witness be credited, but three or two at least, and those whose testimony is confirmed by their good lives."

When Jesus was speaking in the Temple, the Pharisees sneered at Him and said: "Thou bearest record of thyself; thy record is not true." But Jesus replied: "My record is true, for I am not alone; I am one that bear witness of myself, and the Father that sent me beareth witness of me."

Under nearly all the ancient codes one witness was not sufficient to prove anything, and his testimony alone was never received. This was the law under the Code of Justinian, and continued to be the law, almost without variation, up to the beginning of the seventeenth century.

At first all witnesses were considered of equal credibility. The weight of the evidence was determined altogether by the number of witnesses testifying on opposite sides. If the plaintiff had ten witnesses and the defendant eleven, the defendant always prevailed. Of course, this rule was unsatisfactory, and to get away from it the credibility of witnesses began to be measured by their standing in the community.

If the witness held some official position, either in the church or in the government, his testimony carried much more weight than it would otherwise.

Thus it was declared that a squire's testimony was equal to the testimony of four yeomen, and a notary's was equal to three. Blind, deaf, or dumb persons could not testify. The testimony of women and servants was not received in any court of justice. Josephus says: "The testimony of women was refused because of the levity and boldness of their sex, and the testimony of servants was refused because of the ignobility of their souls."

No one who had committed an offense against the law could be a witness. Out of this practice grew still another rule. It came to be that the number of witnesses required in a case depended upon the standing of the accused. If the accused held some exalted position it was necessary that much more evidence be produced against him than against one of lower rank. At one time the law required that before a bishop could be convicted, at least twelve witnesses must have testified against him. Four witnesses were required to convict an alderman or a sergeant, and from six to eight to convict a squire. St. Paul in writing to Timothy (1 Tim. 5:19) said: "Against an elder receive not an accusation but before two or three witnesses."

Thus, when Raleigh insisted that under the law he could not be convicted unless at least two witnesses testified against him, he was insisting upon a law that was as old as the race itself, and which we recognize to-day as one of the fundamental guaranties of our American liberty. In our Federal Constitution it is provided: "No one can be convicted of treason except upon the testimony of two witnesses to the same overt act."

When, however, Raleigh insisted upon being brought face to face with his accuser, he was a pioneer blazing the way, for until the beginning of the seventeenth century witnesses were very seldom brought into the court to testify. Their evidence was received either by someone who had conversed with them, or by written statement signed and acknowledged by them. So profoundly, however, was England aroused over the barbarity of Raleigh's execution, that in less than fifty years thereafter Parliament enacted a law which provided that in all capital cases the accused must be faced by his accuser. In the fifteenth century more than forty thousand persons were put to death by the Inquisition, yet in no case was the accused confronted by his accuser. Prior to the sixteenth century both the judges and the juries were at liberty to obtain the evidence in any way they chose.

In a trial for robbery in London in 1303 the sheriff, when called by the judge to know whether the jury was ready, announced publicly: "Your Worship: The least informed of them has taken great pains to go up and down in every hole and corner of Westminster—they and their wives—and to learn all they can concerning the past and present life of the prisoner."

The jurors were always allowed a fortnight in which to prepare themselves for the trial, by hearing all the gossip possible, and by talking to the litigants.

It was only by such tremendous sacrifices as the death of Raleigh that the great principle of compelling the accuser to face his accused became one of the guaranties of our liberty. Our forefathers wrote it in this language in the 6th Amendment to the Federal Constitution: "The accused shall enjoy the right to be confronted with the witnesses against him and have the assistance of counsel for his defense."

William N. Grunnill

The Case of Shelley v. Westbrooke

(*1 Jac. 266*)

*BY HON. ROUSSEAU A. BURCH**

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THE case of Shelley v. Westbrooke, 1 Jac. 266, 23 Revised Rep. 47, is interesting for a number of reasons. The question involved was the right of a father to rear his own infant son and daughter. The parent concerned was the poet Shelley, the greatest lyrical genius of his age, or indeed of any age. The ground of interference was the father's profession of atheism, the expression of views contrary to the prevailing notions of the marriage relation, and conduct supposed to be the effect of such views. The case was brought in the Court of Chancery, the highest legal tribunal in the British Kingdom, about which clustered so many ancient dignities and regal privileges and powers. The hearing was before Lord Eldon, perhaps the profoundest English lawyer of his time, and the cause was argued on one side by Sir Samuel Romilly, then the most distinguished man at the chancery bar, and later the bearer of high judicial honors; and on the other side by counsel of great experience, prudence, and skill.

The interest aroused by the case at the time is shown by the following paragraph from the London Examiner, appearing January 26, 1817, some days after the hearing, and while the matter was under advisement by the court:

"A cause is now privately pending before the Chancellor, which involves considerations of the greatest importance to all the most tolerant and best affections of humanity, public and private. It is of a novel description, and not only threatens to exhibit a most impolitic distinction between the prince and the subject, but trenches already upon questions which the progress of liberality and self-knowledge has been tacitly supposed to have swept aside, and the return of which would be bringing new and frightful obstacles in the way of the general harmony."[1]

Shelley was then but twenty-five, and little known. At the age of eighteen, when at school, he had written a poem, "Queen Mab," which was privately printed, but not published. In this poem, and in the notes appended to it, he expressed sentiments antagonistic to the received notions of Christianity, and strongly reprobated the institution of marriage as it then existed in the English legal system, as involving "the sale of love" and constituting the essence of tyranny. Such other of his writings as were known had furnished jokes for punstering reviewers, and whatever political and social philosophy he held was supposed to belong to the class of the revolutionary and the doctrinaire.

When he had reached the mature age of nineteen years, and had been expelled from school for exercising a mind of his own, Harriet Westbrooke, a comely maiden of sixteen, suffering under the tyranny of a harsh parent, and consequently the bitterness of an unhappy home, threw herself upon his protection, and to save her they ran away and sought the balm of a Scotch marriage. Afterwards, when a child had been born to them, they were remarried in England in a church for the express purpose of protecting the child under all the customs and canons of society and its laws.

Although he was prospective heir to a baronetcy, Shelley did not receive any

* Address delivered before the Kansas State Bar Association.

[1] Dowden's "The Life of Percy Bysshe Shelley."

portion of his inheritance for several years, and meantime he suffered all the woes of an impecunious versifier in London-town, which knew that character so well.

Strangely enough the first domestic difficulty arose over the care of the babe, her that she went away. He did not desert her. Afterwards they agreed to a separation. He did desire his child, however, and only at Harriet's most earnest protest was it left with her for the time being.

Soon after the separation the second

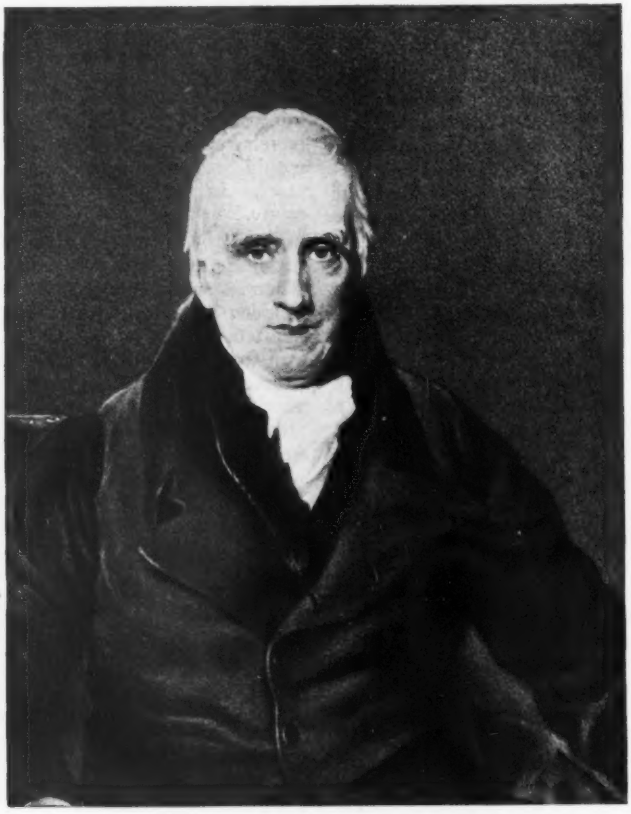


Photo by Boston Photo News Co.

LORD ELDON

From Painting by Sir T. Lawrence at Windsor

Eliza Ianthe. Harriet seemed cold and unaffectionate, and desired to deliver over the nursing of the infant to others. This Shelley could not endure. Of course, the romantic characteristics with which their youthful imaginations had invested each other soon faded away. Harriet was quite Philistine in character and intellect, and their companionship became insufferable to him, and so unpleasant to child, Charles Bysshe, was born to Harriet. A little later Shelley received a portion of his patrimony, and at once settled 200 pounds per year upon the mother of his children.

During all the vicissitudes of his brief career Shelley had remained possessed of a most poignantly sensitive and sympathetic disposition, making, as he wrote in "Julian and Maddolo," but one de-

mand, "to love and be beloved with gentleness."

In the very midst of his deepest depression and profoundest gloom, he met pure, sensitive, refined, and golden-haired Mary, daughter of Godwin, author of "Political Justice," and Mary Wolstoncraft, author of "The Rights of Women." They both fell most genuinely and passionately in love, and eloped to the Continent. Except for the circumstances of its beginning this union was stainless to the end.

After the separation from Harriet her conduct became quite dissolute, and she ended her woes by drowning herself in the Serpentine river.

In the meantime Mary bore to him a son, and immediately upon Harriet's death Shelley married her in St. Mildred's Church, London, in full compliance with every formality of civil and ecclesiastical law. This marriage presented itself to him as his first duty, and he allowed nothing to delay it. His next duty, he felt, was to recover the children Harriet had left.

The Westbrookes kept the children concealed, and after repeated demands upon them, in an effort to finally baffle the distressed father, the chancery suit was begun.

Photo by Boston Photo News Co.

PERCY BYSSHE SHELLEY

From Drawing by Miss A. Curran in National Portrait Gallery, London

The bill of complaint was filed by the infants, Eliza Ianthe and Charles Bysshe Shelley, aged respectively three and two years, by a next friend, against their maternal grandfather, John Westbrooke, his daughter, Elizabeth Westbrooke, their father, and other defendants, praying that they be not placed in the custody of their father, but under the guardianship of the Court of Chancery, and that their father be restrained from taking possession of them.

The cause was heard upon bill and answer, and after having held it under

advisement until March 27th, the Chancellor rendered an opinion the material portions of which are as follows:

"This is a case in which, as the matter appears to me, the father's principles cannot be misunderstood, in which his conduct, which I cannot but consider highly immoral, has been established in proof, and established as the effect of those principles; conduct nevertheless which he represents to himself and others, not as conduct to be considered immoral, but to be recommended and observed in practice, and as worthy of approbation.

"I consider this, therefore, as a case in which the father has demonstrated that he must and does deem it to be matter of duty which his principles impose upon him, to recommend to those whose opinions and habits he may take upon himself to form, that conduct in some of the most important relations of life, as moral and virtuous, which the law calls upon me to consider as immoral and vicious,—conduct which the law animadverts upon as inconsistent with the duties of persons in such relations of life, and which it considers as injuriously affecting both the interests of such persons and those of the community.

"I cannot, therefore, think that I should be justified in delivering over these children for their education exclusively, to what is called the care to which Mr. S. wishes it to be intrusted."

In the argument Romilly at first placed chief stress upon Shelley's anti-theological creed as a disqualification for the duties of fatherhood.

In this country the question of the right or power of courts to investigate any man's view upon religion or theology had been determined before Shelley's birth. We are all familiar with the provisions of the Federal and state constitutions upon the subject, and so thoroughly compatible have they been with the sentiments of the people that no attempt has ever been made to alter or infringe them; and it is commonplace to us that the state has no power to invade the citadel of conscience and the sanctuary of the soul,—and this not from any indifference, but that the infinite spirit of eternal truth may move in perfect freedom, purity, and power.

But this case of Shelley v. Westbrooke proves that our prohibitions upon the power of government are wise, and that any attempt to make such a question the subject of judicial investigation results in injustice. Now that the fury of the hour has subsided we can perceive what reverent admiration Shelley felt for Jesus of Nazareth, and how profoundly he understood the true character of his teaching. His many allusions, as in "Adonais," to that power

> "Which wields the world with never wearied love—
> Sustains it from beneath and kindles it above,"

were express personal acknowledgments of the God which poor, crude "Queen Mab" denied; and his belief in immortality was as perfect as it was beautiful.

It is now plain that Shelley's fierce tirades against historic Christianity were really directed against an ecclesiastical system of spiritual tyranny, hypocrisy, and superstition, which, as he saw where Eldon was blind, retarded the growth of free institutions and fettered the human soul. He understood the Christ who sealed the gospel of love with his blood; he anathematized only those churchmen who would have been the first to crucify their Lord if returned to earth.

But more than this: Shelley put his creed into works. His constant occupation was the helping of the needy and the relieving of the sick. He gave money freely when he could illy spare it; he kept memoranda of the necessities of deserving poor, and when he became heir to the richest baronetcy in Sussex he continued as before, in a simple, unostentatious way, to visit the sick in their beds and to find refuges for the homeless.[2] Never has there been exhibited more of—

> "That best portion of a good man's life,
> His little, nameless, unremembered acts
> Of kindness and of love,"

than in Shelley. These and the genuine greatness of soul and purity and sweetness of character which produced them are beyond the power of any court to estimate or weigh, and it is almost a sacrilege to make the attempt.

"Queen Mab" was written at eigh-

[2] Symond's "Percy Bysshe Shelley."

teen. At twenty-nine Shelley's life was ended. "But men will no longer persist in confounding any more than God confounds with real infidelity and atheism of the soul those passionate boyish struggles toward distant truth and love, made in the dark before the moral sunrise could shine out full upon him."[3]

Shelley's conduct in the union with Mary, without legal separation from Harriet, cannot be justified or condoned. The law cannot, any more than can good morals, compromise upon a question of such vital importance to society. But it may well be questioned if the judgment of the court was not somewhat beside Shelley's offense. If his doctrine were reprehensible and led to conduct which was vicious, he might have been punishable. But the duty as a father to rear his own offspring remained, and his right to their custody for that purpose remained. It might have been the business of the law to protect the children and society by inflicting chastisement and enforcing reformation, but no right accrued to the state to permanently shift the duties and responsibilities attaching to parenthood or to permanently sever parental ties. Such was Shelley's position, and in view of all the facts in the case it seems impregnable.

The conclusion of the Chancellor that Shelley's conduct was the result of the opinions which he had expressed in "Queen Mab," six years before, appears to have been unwarranted. Not a word that Shelley ever wrote or spoke, and not a syllable from the lips or pen of Mary Shelley, can be found to support it, and the whole history of the episode is entirely to the contrary. Besides this, there is in existence a fragment of a paper drafted by Shelley to be filed with the Chancellor by way of supplemental argument while the cause was under advisement, in which he most earnestly protests that no such theory in any way affected his relation with Mary, and insists that their union arose from perfectly spontaneous affection entirely free from the influence of any doctrinarianism whatever. This being true, one of the chief props of the judgment must be taken away.

[3] Browning's Essay on Shelley.

The decision, however, places most stress upon the fact that Shelley would feel it a duty to instruct his children upon the marriage relation. Those children were just then two and three years of age, and most of all were in need of a father's care. All irregularities in the union with Mary were ended by their marriage. No charge could be made that Shelley regarded the relation of parent and child as anything less than sacred, and to say that any contamination could come to those babes on account of abstract theories upon a social and legal institution borders upon the absurd. But if, upon their arriving at years of discretion, Shelley had undertaken to teach them from his own life and his own belief, and his own conduct, what would have been the nature of such instruction? He would have instilled into them the necessity of yielding absolutely and entirely to the law and custom of their country, for he had been married twice in a church, according to the prevailing notions of both religion and of law. This is conclusive proof that the "Queen Mab" fulmination constituted no essential part of Shelley's theory of conduct, and that no child would ever have been prejudiced or corrupted on that account while under his tutelage.

There is no body of work of equal magnitude in English literature more free from any stain than that of Shelley. He has nothing but abhorrence for the low and carnal, and nothing but the finest idealization for the chaste and pure. Indeed, it was the vividness with which he saw the shortcomings of the bigoted, selfish, blind, and torpid aristocracy around him that put him in revolt.

In order to fortify the effort to keep custody of the children, John Westbrooke settled upon trustees for their benefit £2,000 in 4 per cents, which might be presently enjoyed upon marriage with his consent. To Lord Eldon this act appeared beneficent indeed. To Shelley's clear insight it was utterly debasing and degrading. He knew the tremendous power of social custom and restraint. He knew the irresistible tyranny with which it could dominate young lives. And he knew this money proposition meant that his blue-eyed baby girl

should grow up subject to all that coercion and all that tyranny, with the bribe constantly before her that should she under the mummeries of an idle ceremony surrender her fair body to the nominee of old John Westbrooke, no matter what the attitude of her heart and soul might be, a moiety of £2,000 in 4 per cents was waiting.

Because Shelley cried out most bitterly and most passionately against the law and the social creed which baptized this form of prostitution as holy, and did so, not simply for his own child but for all the daughters of men, that law and that society branded him unclean, and sundered him from his own flesh and blood.

It had too long been the reproach of the Court of Chancery that its notions of equity and good conscience were as variable as the mental and moral equipment of the occupant of the Chancellor's seat; and in considering this judgment it is not improper to inquire into the character and career of this Lord High Chancellor who assumed jurisdiction of Shelley's morals and Shelley's children. Having exhibited decided talents for persecution he was given the attorney generalship at about the time of Shelley's birth. In 1793 he justified every despotic anticipation by instigating and conducting the famous trials for high treason of those English gentlemen who dared to express sympathy for the French people as against their Bourbon Kings. For some years he held a seat in the Commons, and not one measure did he advocate or help to pass excepting it be for popular coercion. This helped him to a peerage, and he entered the House of Lords as baron in 1799. In 1801 he won the chancellorship through zeal in the persecution of Catholics. He soon resigned with the rest of the ministry, but was reappointed for his long service in 1807. In 1805 he opposed the Emancipation Bill. In 1807 he opposed the abolition of the slave trade. In 1809 he opposed the bill abolishing the death penalty for minor offenses. To show his moral caliber it may be mentioned that during the insanity of George III. he never hesitated in the accomplishing of his ends to procure the King's signature on the pretext that he was competent as King if not as an individual. In 1812 he was created earl by the dissolute and profligate George IV. on account of his loyalty in the various outrageous attacks upon Queen Caroline. In 1826 he opposed the repeal of the test act. In 1829 he opposed Catholic emancipation. In 1831 he actually defeated the reform bill. In 1833 he opposed the bill regulating the judiciary, and his last public utterance upon July 25, 1834, was against railroads as "dangerous innovations." For forty years he fought against every improvement in the law and the constitution, and, without any political principles whatever properly so-called, he maintained himself in power purely by his devotion to absolutism, by his persecution of religious faith, and by his zeal against political reform.[4]

Sidney Smith paints for us this graphic picture of the time: "The Catholics were not emancipated. The corporation and test acts were unrepealed. The game laws were horribly oppressive. For every ten pheasants which fluttered in the wood one English peasant was rotting in jail. Steel traps and spring guns were set all over the country; prisoners tried for their lives could have no counsel. Lord Eldon and the Court of Chancery pressed heavily on mankind. Libel was punished by the most cruel and vindictive imprisonments. The laws of debt and conspiracy were little understood. Not a murmur against any abuse was permitted; to say a word against the suitorcide of the Court of Chancery, or the cruel punishments of the game laws, or any abuse which a rich man inflicted and a poor man suffered, was treason against the plousiocracy, and was bitterly and steadily resented."

Again he says:

"The abuses of the Court of Chancery have been the curse of England for centuries. For twenty-five long years did Lord Eldon sit in the court, surrounded by misery and sorrow which he never held up a finger to alleviate. The widow and orphan cried to him as vainly as the town crier cries when he offers a small

[4] "John Scott and John Marshall" by Chief Justice Cassoday, 33 Am. L. Rev. I. Campbell's Lives of the Chancellors.

reward for a full purse. The bankrupt of the court became the lunatic of the court; estates mouldered away and mansions fell down, but the fees came in and all was well. But in an instant the iron mace of Brougham shivered to atoms this house of fraud and delay."[5]

Lord Campbell in his Lives of the Chancellors is equally severe. But from boyhood to the day of his death Shelley stood for liberty. The passion of his life was liberty. It beats and throbs and beams and burns in all his verse, and all the while he thrilled with an aspiration toward that universal love which is the democratic and the Christian ideal. One of his own poems best describes him:

"One whose heart a stranger's tear might wear
As water-drops the sandy fountain-stone;
Who loved and pitied all things, and could moan
For woes which others hear not, and could see
The absent with the glass of phantasy.
And near the poor and trampled sit and weep,
Following the captive to his dungeon deep—
One who was as a nerve o'er which do creep
The else-unfelt oppressions of this earth."

When we view the two men, Shelley and Eldon, in the attitude of their souls toward the world's need and the world's work, it was indeed true irony of fate that the master spirit, the sublime genius whose aspiration and creed was liberty and love, should have the most conservative of all conservatives, John Scott, appointed to judge him.

It is said that from the Chancellor's standpoint the decision was not unjust. But in this fact lies the tragedy. True it is no court in any hearing upon bill and answer supported by affidavits could catch even a glimpse of all that was gentle and beautiful and elevated in Shelley's character, and of all that was noble and inspiring in Shelley's ideals. No judge could estimate with even the feeblest approximation the advantages to be derived by little Charles and Ianthe from the sweet communities of such a father's love and the pure and high influences of his genius. No judge could, by any possibility, anticipate or understand that in Mary Shelley two helpless babes would have found a tender, affectionate, wise, and pure and devoted mother. And because of these inherent, absolute, and irremediable disabilities it seems a mockery indeed that the state, in its majesty, should have assumed to substitute a court-constituted one for such natural guardians, and to transfer little children from such a love-made one to a law-made home.

In his very best efforts, too, the Chancellor was likely to run counter to natural laws, fundamental to the family relation. Thus Emerson says:

"Is a man too strong and fierce for society, and by temper and position a bad citizen; a morose ruffian with a dash of the pirate in him:—nature sends him a troop of pretty sons and daughters, who are getting along in the dame's classes in the village school, and love and fear for them smooths his grim scowl to courtesy. Thus she contrives to intenerate the granite and felspar, takes the boar out and puts the lamb in, and keeps her balance true."

That sometimes parents should be deprived of their children as they are deprived of their liberty in other respects cannot be questioned. But, as Herbert Spencer contends, care should be taken not to yield to a certain superstition, quite predominant at times, that society is of governmental manufacture, and not a natural growth; that parents may be permitted yet for a time to beget children, but that the state must assume the care of them; and that parents unfit as members of a family to be responsible for the culture of their own children are nevertheless capable in their capacity as voters to direct and manage the culture of other men's children. A time should finally come when a man may protest against the opinions of the multitude without fear that a court of justice may be made an instrument of oppression; when parenthood shall attain to a plane of the highest dignity and purity; and when the relation of parent and child shall be sacred from any governmental intrusion whatever.

Meanwhile, the soul of Shelley, as the soul of his Adonais,

"Like a star
"Beacons from the abode where the eternals are."

[5] Quoted from Dillon's Laws and Jurisprudence of England and America.

The First Code of Legal Ethics

BY WALTER B. JONES

Of the Montgomery (Alabama) Bar

THE first Code of Legal Ethics ever adopted in the United States, the Code which has been adopted by the bar associations of eleven states,—and the Code which is the foundation for the American Bar Association's Canons of Ethics, is the Code written by Major Thomas Goode Jones, of Montgomery, Alabama, who later became governor of Alabama and United States district judge, and accepted by the Alabama State Bar Association in 1887.

The Alabama Code of Ethics had its origin in the suggestion made in the report of the Committee on Judicial Administration and Remedial Procedure, presented to the Alabama State Bar Association in 1881, by Major Jones, its author. One section of the report urged a "Code of Ethics," and "earnestly recommended that the association appoint a committee, with instructions to report a Code of Legal Ethics for consideration at the next annual meeting." In support of his suggestion, Major Jones wrote:

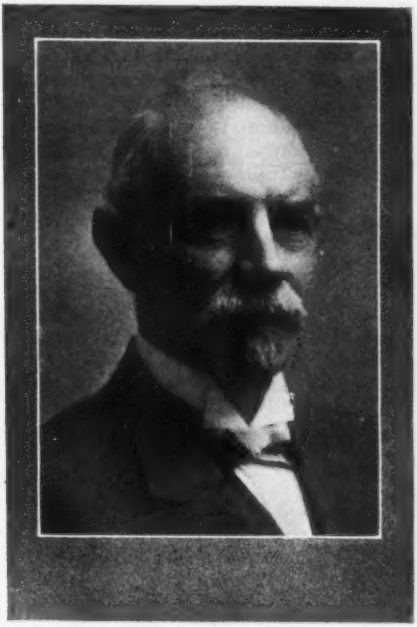
"While there are standard works of great eminence and authority upon legal ethics, these are not always accessible. In many instances practices of questionable authority are thoughtless rather than wilful, and would have been avoided if any short, concise Code of Legal Ethics, stamped with the approval of the bar, had been in easy reach. Nearly every profession has such a work, which is treasured by its members. With such a guide, pointing out in advance the sentiment of the bar against practices which it condemns, we should find them gradually disappearing; and should anyone be bold enough to engage in evil practices, the Code would be a ready witness for his condemnation, and carry with it the whole moral power of the profession. . . . What just complaint exists of lawyers stirring up strife, or being swift to originate or initiate litigation, would vanish when the profession throughout the state raises its warning voice in advance against these pernicious practices. The lawyer who shall frame such a Code need ask no greater or more enduring fame. Nothing would more effectually promote the ends of justice, or tend more to advance judicial administration."

No action was taken upon his suggestion until the meeting of the association at Montgomery, in 1882, when Major Henry C. Semple moved the appointment of a committee of three, of which Major Jones should be chairman, to report a Code of Ethics to the next meeting of the association. The motion was adopted, but owing to some misunderstanding the committee was not appointed, and Major Jones, who was named chairman in the resolution, felt it improper to proceed alone, in view of the delicate and important duty imposed upon the committee.

At the meeting of the association in 1883, the report of the executive committee said: "Your committee believe that a Code of Ethics would go very far, using the language of our Constitution, 'to advance the science of jurisprudence, to promote the administration of justice throughout the state, uphold the honor of the profession of the law, and establish cordial intercourse among the members of the bar of Alabama.'" Thereupon, a special committee, consisting of Major Thomas G. Jones, of Montgomery, chairman, R. O. Pickett, of Florence, and Colonel Daniel S. Troy, of Montgomery, were appointed to report a Code of Ethics for the association. Colonel Troy and Mr. Pickett took no active part in the preparation of the Code, but it is probable that Major Jones submitted it to them before presenting it for adoption.

When the report of this committee was reached at the Birmingham meeting of the association in 1884, Major Jones was present and stated that he regretted to have to ask further time. "Drafting a Code of Ethics," said he, "is a matter of

such importance to the profession that it could not be done hurriedly. A great deal of preparatory work has been accomplished. Letters have been written to many eminent lawyers and judges, asking suggestions, and with the aid thus obtained the chairman expected to be able to draft the Code and submit it to the members of the committee in time to be acted on at this meeting. The week set apart for this work was unavoidably taken up with other duties, and the committee is reluctantly compelled to ask the indulgence of the association until its next meeting." Further time was granted. The association met again in 1884, and when the report of the special committee on Code of Ethics was asked for, Governor Thomas H. Watts stated that Major Jones was engaged in the legislature, and moved that the report be postponed. General Edmund W. Pettus, later a distinguished United States Senator from Alabama, stated that Major Jones had prepared a report for his committee, but that his duties in the legislature were so pressing he had been unable to review it. On the motion of General Pettus the report was postponed, and ordered printed in pamphlet form, to be sent all members of the association, so that they could familiarize themselves with it before the next meeting.



HON. THOMAS G. JONES

At the eighth meeting of the association at Montgomery, in 1885, Mr. Alex Troy, who was then, as he is now, the efficient secretary of the association, stated, when the report of the special committee was called for, that Major Jones was engaged in the United States court; that a Code of Ethics had been prepared by him, and that if he could get to the meeting he would present it. However, Major Jones was unable to attend, and the report was not submitted.

In 1886 the ninth meeting of the association was held in Montgomery, and Major Jones was again unable to report the Code of Ethics because a large part of the Code as prepared had been lost from his desk in the Alabama house of representatives. The association was about to adjourn, the missing parts could not be recopied in time for consideration, so the matter was postponed to the next meeting. The tenth meeting of the association was again held in Montgomery. During the morning session of December 14, 1887, Chairman Jones read the proposed Code for the first time, and it was made a special order for 4:30 P. M. That evening consideration of the Code was taken up section by section. The Code as reported contained fifty-six sections, and each section, except sections 3, 5, 14, and 20, was adopted without objection or discussion.

When section 3, relating to attempts to exert personal influence upon the court, was read, Major Semple moved to strike it, saying that he thought it unnecessary. Major Jones stated that the section had been put in the Code because of well-known occurrences in the past, mentioning especially the abuses which existed when Richard Busteed, the carpet-bag Federal judge, sat on the bench of the United States court at Montgom-

ery. General Pettus also made a speech in support of the section. It was adopted as read, and is now section 3 of the Alabama Code, and is also carried into the American Bar Association's third canon.

Section 5 of the Code as submitted was then read, and Colonel G. W. Hewitt, of Birmingham, moved to strike out that part of the section characterizing as a deceit unworthy of attorneys "offering evidence which it is known the court must reject as illegal, to get it before the jury, under guise of arguing its admissibility." Colonel Henry C. Tompkins then offered as a substitute the following: "Arguing the admissibility of evidence which it is known the court must reject, for the purpose of getting it before the jury." Messrs. Blakey, Jones, London, Stansel, and Stone spoke in favor of leaving the section as reported. The motions of Colonels Hewitt and Tompkins were lost. Section 5 is now a part of the American Bar Association's canon No. 22.

Section 14 of the proposed Code read as follows:

> "An attorney *must* decline in a civil cause to conduct a prosecution, when satisfied that the purpose is merely to harass or injure the opposite party, or to work oppression or wrong; *but once entering the cause he is bound to avail himself of all lawful advantages in favor of his client, and cannot without the consent of the client afterwards abandon the cause.*"

On motion the word *may* was substituted for the word *must*. And then, on motion of Major Jones, the portion of the section which I have italicized was stricken out. The first change does not appear to have been made in copies sent out by the association, nor does it appear in American Bar Association's canon No. 31, which is based on this section of the Alabama Code.

Section 20 provided that "an attorney should not be counsel in his own cause." When this was read, Mr. Alex T. London, an able Birmingham lawyer, evidently having in mind the ancient maxim, said he saw no objection to the section. "But," he continued, "it is one of the American privileges to make a fool of yourself, and it is guaranteed by the Constitution, and I don't see anything wrong in it,—anything immoral in it." His motion to strike the section was carried without further discussion.

Thus the Code as written by Colonel Jones, without model or guide, though, of course, he had read Judge Sharswood's Essay on Professional Ethics, and without amendment except in two unimportant particulars, was adopted, and the Alabama State Bar Association has the honorable distinction of having adopted the first Code of Legal Ethics in America.

The Alabama Code was so clear and precise in its provisions and so admirably arranged that it became the foundation of all other Codes, and was adopted almost *totidem verbis* in the following states, in the order indicated: Georgia, Virginia, Michigan, Colorado, North Carolina, Wisconsin, West Virginia, Maryland, Kentucky, and Missouri.

But still greater honors were to come to the Alabama Code of Ethics and its author. In 1907 the committee on code of professional ethics of the American Bar Association made a report, and, among other things, recommended that it "be continued and enlarged by the addition of Judge Thomas Goode Jones, author of the Alabama Code, which with but few alterations has been adopted by the bar associations of eleven other states." The committee also said: "While Sharswood's Essay on Professional Ethics was doubtless the inspiration for the Alabama Code, the profession is nevertheless indebted for that Code's existence to the initiative of Colonel Thomas G. Jones."

The American Bar Association's committee made its final report in 1908, and the Canons of Ethics submitted by them were adopted. Among those who composed the committee were Henry St. George Tucker, chairman, Lucien H. Alexander, secretary, David J. Brewer, J. M. Dickinson, Thomas H. Hubbard, Francis Lynde Stetson, Alton B. Parker, and Thomas G. Jones. Section 4 of their report reads as follows:

> "The foundation of the draft for Canons of Ethics, herewith submitted, is the Code adopted by the Alabama State Bar Association in 1887, and which with but slight modifications has been adopted in eleven other states. The

committee in this connection (Judge Jones not concurring in the personal reference to himself) desire to record their appreciation of the help they have received in this work from their fellow member, Honorable Thomas Goode Jones, of Alabama, who was the draftsman of the Alabama Code of Ethics, and who attended the three days' session of your committee in Washington, March 30 to April 1, 1908, and moved the adoption of a number of your committee's modifications of the Alabama Code drafted by him more than a score of years ago."

Major Jones, the young lawyer forty years old, probably little thought as he penned the words, "The lawyer who shall frame such a Code need ask no greater or more enduring fame," that he would be the author of the Code. Yet he was, and ere his long and useful life closed among the people he loved, in his record as a brave Confederate soldier, a wise governor of Alabama, and a just and fearless judge, he earned "more enduring fame."

Walter B. Jones

The Lawyer's Rewards

Sometimes if discouraged
Our efforts may seem
Like nightmares of errors
Or ghost-troubled dream.

But why be downhearted
And weakness display,
Or shirk like the coward
And fall by the way?

The lawyer who bravely
His work will pursue,
And ever endeavors
His duty to do,
And nobly the cause of
His client shall keep,
The highest of honors
Shall joyfully reap.

Take courage, dear brothers,
When burdens distress;
In time just rewards all
Your labors shall bless;
And if there's a heaven
Where lawyers may go,
The Lord shall reward
You for goodness below.

Wm D Jatten

Trial of John Brown

*BY HON. GEORGE E. CASKIE**

of the Lynchburg, (Va.) Bar

THE trial of John Brown did not establish any great legal principles, nor is it pre-eminent as a great legal battle, but the conditions out of which it grew were as momentous as those connected with any of the great contests which had preceded or which have followed it, and place it well up in the list of important trials.

In order to appreciate the position of the prisoner and the environment under which the trial was held, it will be well to review for a moment a few leading facts as to Brown himself.

John Brown's ancestors were amongst the Puritans who landed at Plymouth; in his veins mingled the blood of three sturdy races, the Scotch, the Dutch, and the Welsh. For at least three generations the Brown family had been abolitionists, and John Brown, reared amongst such environments and possessed of an intense nature, became an intense abolitionist. He himself attributed much of his zeal to the ill treatment of a young negro slave which had come under his observation when he was very young, and which, he said, caused him to dedicate his life to the abolition of slavery. Right well did he keep his vow.

The first idea he seems to have had on the subject, as shown by a letter to his brother Frederick, written in 1834, was to educate the slaves; being of the opinion that, if he could accomplish this, the slave owners would be forced to begin the work of emancipation without delay. It was about this time that, gathering his older sons in his humble home, he and they engaged in earnest prayer for the cause of abolition; and whilst on their knees, with hands and voices raised to Heaven, each solemnly pledged himself to devote his life to an effort to abolish slavery.

In the year 1840 he was engaged as a surveyor in the neighborhood of Harper's Ferry, and thus acquired some information as to the country, and perhaps heard the remark which had been attributed to George Washington, to the effect that the mountains around Harper's Ferry would serve as a stronghold for the Continental Army in the event it was repulsed by the British. Subsequently, Brown expressed the opinion that these same mountains were designed by the Almighty as a refuge for the fugitive slaves.

In 1846 Gerrit Smith, a large landowner of New York, donated 10,000 acres of wild land in Northern New York to such colored families as would settle upon, clear, and cultivate it. Brown approved that plan, and, in order to aid it, obtained himself a small part of this land, upon which he moved with his family, and which he ever afterwards regarded as his home.

Shortly after locating in New York, Brown seems to have become very hostile to all slave owners, and we find him in Springfield in 1847 denouncing slavery in look and language fierce and bitter, and declaring that slave holders had forfeited their right to live, and that the slaves had the right to resort to any means to rid themselves of their masters and gain their liberty.

In 1854 the Kansas excitement was at its height; five of Brown's sons moved to Kansas, attracted by the double inducement of finding desirable homes and of lending their aid to the effort to make Kansas a free state. In October, 1855, John Brown himself went to Kansas and played no small part in the stirring scenes which occurred in that state during the

* From paper read before the Virginia State Bar Association.

terrible struggle through which it had to pass.

During all this time Brown's views had evidently been undergoing a change, for while his zeal never abated in the least, and his determination never wavered, his idea as to the best method by which to slave soil a defensible station, within reach of the Pennsylvania border, where the fugitive slaves could defend themselves until transferred, as occasion offered, through the free states to Canada.

By the year 1857 Brown had evidently reached the conclusion that his end could

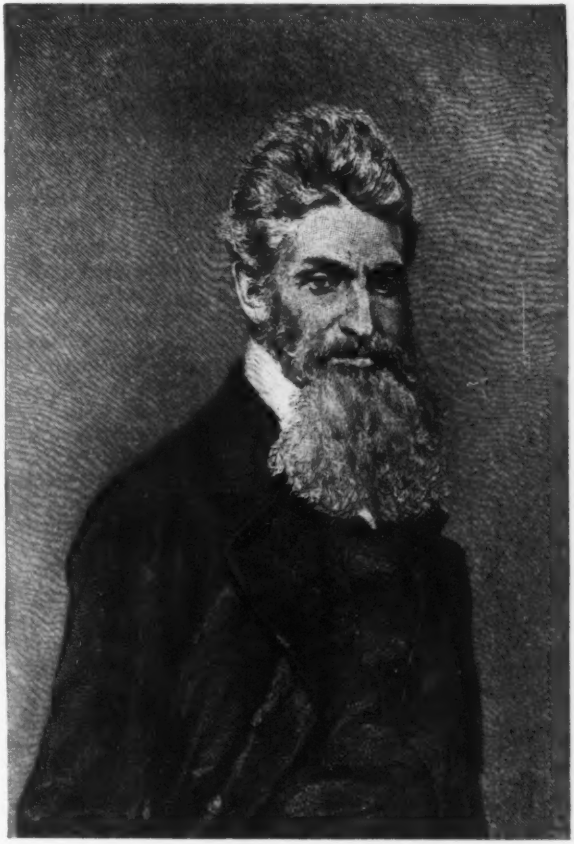


Photo by Boston Photo News Co.

JOHN BROWN OF OSSAWATOMIE (AND HARPER'S FERRY).

accomplish his object materially changed. As early as 1847 he is said to have consulted with Fred Douglass and secured his approval of a scheme for transporting fugitive slaves into a free country, and protecting them until such transportation could be accomplished.

Afterwards, in discussing the Harper's Ferry incident, Brown declared that his only object was to establish on only be accomplished by resort to arms, for in that year he established at Tabor, Iowa, a school for military drill and later a similar school at Springdale, Iowa. During the same year he obtained possession of 200 rifles which had been contributed by George L. Stevens, of Massachusetts, for the use of the Free State people of Kansas, and began negotiating with friends for money, ammunition,

etc., and in 1858 he made a trip North to raise money to be used in carrying out his scheme.

On the 3d of June, 1858, he left Boston with permission to retain the rifles, also with $500 in gold; later he made other collections of money and contracted with a Connecticut firm for the manufacture of 1,000 pikes.

Brown does not seem to have realized the difficulty of collecting an army to be composed of fugitive slaves, nor to have realized that the placing of a pike in the hands of such men would not convert them into soldiers.

Harper's Ferry seemed well suited for his purposes. Accordingly, in June, 1859, Brown and two of his sons appeared in that neighborhood for the avowed purpose of buying a home, or renting a farm for a term of years. They gave the name of Smith, John Brown himself being known as Isaac Smith. They succeeded in renting a place known as "the Kennedy Farm," where they resided unsuspected by the neighbors until the attack on Harper's Ferry, when Brown was recognized, after his capture, by Lieutenant J. E. B. Stuart, of the United States troops, who had known him in Kansas and who addressed him by his true name when he was captured. Brown's daughter, Ann, and his daughter-in-law, Mrs. Owen Brown, kept house for them. Here they gradually received the rifles from Ohio and the pikes from Connecticut, and gathered together their men.

In August he met Fred Douglass by appointment. They met in an abandoned and long-neglected rock quarry near Chambersburg. Douglass brought with him the negro Shields Green, while Brown was accompanied by his trusted friend Kagi. The meeting was kept strictly secret. They remained in consultation most of Saturday and Sunday. With rocks serving as chairs, they discussed the matter in all of its details, Brown announcing his purpose to take Harper's Ferry. Douglass urged that they should adhere to the former plan of running off slaves, pointing out that Brown's plan would necessarily be fatal to all those engaged; that it would likely be regarded as an attack upon the Federal government, and would arouse the whole country. Brown thought that the whole country should be aroused. He believed that the attack upon Harper's Ferry would be as a great bugle blast at which all of the slaves and their friends would rally, and, armed with rifles and pikes, would be practically invincible. He urged Douglass to join him, but he was as immovable as Brown. When about to leave, Douglass asked Green what he had decided to do, to which Green replied, "I believe I will go wid de ole man;" and he did to the bitter end.

By the middle of October, Brown had collected at the Kennedy Farm twenty-two men, six of them negroes; these spent the days in hiding, only going out at night.

On Sunday evening, October 16, 1859, it was dark, cold, and raining. Brown decided that the time for action had come. After delivering a short address to his men, he started to the ferry with eighteen men, two being left to take care of the supplies at the farm, whilst two were sent to cut the telegraph wires, and then to protect some arms and ammunition left at a schoolhouse, about a mile from the ferry. By half-past 10 they had reached the United States Arsenal, which they broke open with sledge hammers, and, overpowering the guard, appropriated such of its contents as they desired, and established headquarters. By midnight his men were in possession of the town and quietly patrolling the streets. Six of his men were sent out to arrest some of the more prominent of the slave owners in the adjoining country, who were to be, and afterwards were, held as hostages.

Shortly after midnight the east-bound express train was due; four men were sent to stop it, and in this effort the negro porter was shot and killed, being the first life to be sacrificed in this enterprise. The train was detained for several hours, but finally, in a moment of weakness, Brown released it, and it was allowed to go on, spreading the news of the raid and hastening the doom of the raiders.

When the citizens of the town awoke on Monday, October 17th, from twelve to fifteen prisoners had been brought

into the Armory, and several bodies of slaves had been liberated. Among the prisoners was Colonel Washington, the possessor of the historic sword presented to George Washington by Frederick the Great, which Brown had especially directed should be impressed for his own use. In the early hours of the morning, as the citizens of the town appeared on the streets, they were arrested, till some forty or fifty were prisoners in the Armory; but when the town became fully awake, the citizens began to arm themselves and exchanged shots with Brown and his men. The news spread, and as speedily as possible the State Militia was called out. The Jefferson Guards, of Charlestown, under the command of Captain Rowan, arrived some time during the day. This company, together with the citizens, had so depleted Brown's forces that but six remained, and these, together with the more prominent of their prisoners, had been forced to abandon the Armory and take refuge in the engine house, in the sides of which Brown made holes through which they could shoot. Brown had lost the major part of his men, while, on the other side, several of the citizens had been killed.

By 3 o'clock the Winchester Rifles, commanded by Captain Clarke, had arrived, and a little later the Continental Marion Guards, of Winchester, under the command of Captain Lewis Barley, were also on the grounds. These three companies of State Militia, commanded by Colonel L. S. Moore, of Winchester, held Brown and his men in the engine house until the United States Marines, eighty in number, under the command of Colonel R. E. Lee, reached the scene of action, about 3 o'clock on the morning of October 18th. About 7 o'clock Captain J. E. B. Stuart, of the United States forces, offered Brown opportunity to surrender and release his prisoners, promising protection to him and his men and a fair trial by law. Brown declined, being willing to surrender only on condition that he and his men should be allowed to cross the river unmolested.

Fearing that some of the citizens held by Brown as prisoners might be shot, Colonel Lee ordered his soldiers to draw their loads and fix their bayonets on their guns. The door of the engine house was battered down, and Brown and his men taken prisoners; two of the marines being wounded and one killed in the effort. Brown was not to be captured, however, without resistance; and in order to effect his capture Lieutenant Green struck him over the head with a saber, and some of the soldiers wounded him with their bayonets, inflicting the wounds from which he suffered during his trial. Ten of Brown's men were killed, five escaped, and the remaining seven were captured.

Excitement was of course very high, and if Brown and his companions had been put in the hands of the civil authorities, or even the State Militia, to be conveyed to the jail at Charlestown, it is doubtful whether there would have been any need for a trial. They were, however, escorted to the jail by the United States Marines, whose connection with the matter then ceased, the State Militia performing all the necessary guard duty from that time until after the execution.

When Brown reached Harper's Ferry his first act was to take possession of the United States property, and to overpower and remove the United States guards found there. When finally captured, it was by the United States troops upon United States property, after a fight in which one of the United States Marines was killed. Were these occurrences to take place to-day, it will hardly be doubted that jurisdiction of the whole matter would be taken by the United States courts.

As Brown was anxious for time, and doubtless would have preferred that his trial should be held as remote from the scene of his crime as possible, it seems strange that he and his friends did not make an effort to invoke the Federal jurisdiction. It only goes to show how the rights of the states were then regarded as paramount to even that of the general government.

That no effort was made to take these men out of the hands of the law is most creditable to Virginia. To some extent it may have been due to the conviction, which seems to have been universally prevalent, that they would be tried and convicted within the space of a very few

days by the circuit court, then just about to hold its fall session.

The general public in and around Harper's Ferry was in no condition to give quarter to Brown or any of his men; still they were satisfied to let the law take its course, now that the prisoners were safely in Charlestown jail, in the charge of Captain John Avis, the jailer, in whose ability to hold them, especially when aided by State Militia, the public had absolute confidence; then, too, the public believed that only a day or two would be needed for the law to vindicate itself and punish the criminals.

The Virginia statute, however, provided that the prisoners should have five days' notice of the preliminary examination, and this must precede the court trial; thus a little delay was occasioned. It was during this period that Governor Wise saw and interviewed Brown. No record of this interview seems to have been preserved, but at its close Governor Wise said: "They are themselves mistaken who take him to be a madman. He is a bundle of the best nerves I ever saw, cut and thrust and bleeding, and in bonds. He is a man of clear head and courage, fortitude, and simple ingenuousness. He is cool, collected, and indomitable; and it is but just to him to say that he was humane to his prisoners, and he inspired me with great trust in his integrity as a man of truth. He is a fanatic, vain and garrulous, but firm, truthful, and intelligent."

The public were not idle, however, whilst they waited for the trial. Rumors of all sorts were rife. There were those who believed that Brown would never have undertaken so perilous and impossible a task, unless there were some arrangement by which he was to be reinforced, either by slaves who were already organized to take up the fight or by some of the abolitionists of the North, who might appear on the scene at almost any moment; the belief that a rescue would be attempted was well-nigh universal. Brown himself expected to be rescued. A gentleman who acted as one of his guards and spent one or more nights with him in his cell told me that he expressed the opinion that he would never be executed, but that his friends in the North would make an effort to rescue him, and would succeed. This opinion, my informant says, he retained until the morning of his execution.

These conditions caused the citizens to arm themselves and the governor to keep the state troops constantly on guard, so that from the time Brown and his men were put in jail until after his execution, Charlestown had much the appearance of a military camp.

The preliminary examination was held on October 25, 1859. The early morning found Charlestown in the possession of the Militia. Cannons were posted before the courthouse, and every approach was guarded by armed sentries. The town was crowded with people, not only from the immediate vicinity, but from remote sections, each and all anxious to get a view of the prisoners and to witness the proceedings. For the most part the crowd was orderly and behaved with great circumspection. There were, however, individuals who indulged in denunciation of the prisoners and their crime. The crowd pressed against the courthouse door eager to gain admission, and when finally it was opened, the room rapidly filled until there was not standing room. Eight justices of peace, Colonel Davenport presiding, formed the examining board. They ascended the bench, and almost immediately the courthouse bell announced that the proceedings were about to begin, and a double file of soldiers marched from within the jail and took their positions on each side of the path leading from the jail to the court room. Along this path and between these soldiers Brown and his associates were escorted in charge of Sheriff Campbell, John Avis, the jailer, and an armed guard. The commonwealth was represented by Charles Harding, the commonwealth's attorney of Jefferson county, and Andrew Hunter, who was appointed special prosecutor.

The attorney of the commonwealth made inquiry as to whether the prisoners had or desired to have counsel.

Brown rose from his chair, disregarding the court, and fixing his eyes on the crowd, as if by his manner to charge that the crowd and not the justices were his judges, he said: "Virginians, I did not

ask for quarter at the time I was taken; I did not ask to have my life spared. The governor of the state of Virginia tendered me his assurance that I should have a fair trial, but under no circumstances will I be able to attend to my trial. I have no counsel, I have not been able to advise with anyone. I know nothing about the feelings of my fellow prisoners, and am utterly unable in any way to attend to my own defense.

"My memory don't serve me. My health is insufficient, though improving. If a fair trial is to be allowed us there are mitigating circumstances that I would urge in our favor; but if we are to be tried by a mere form, a trial for execution, you might spare yourselves the trouble. I am ready for my fate; I do not ask a trial. I beg for no mockery of a trial, no insult, nothing but that which conscience gives or cowardice would drive you to practice. I ask again to be excused from the mockery of a trial. I do not know what the special design of this examination is; I do not know what is to be the benefit of it to the commonwealth. I have now little further to ask, other than that I may not be foolishly insulted, as only cowardly barbarians insult those who fall into their power."

The court assigned C. J. Faulkner and L. Botts to defend the prisoners. The preliminary examination was, of course, uneventful; a few witnesses were examined and the prisoners sent on to the grand jury, but not until Brown had again objected to the proceedings, and asked for further delay.

Despite the independent and defiant way in which Brown had addressed the examining court, he was not as indifferent to the result as it would seem; almost immediately upon his incarceration he had written to Judge Tilden, of Massachusetts, asking his aid in procuring counsel from without the state of Virginia.

As soon as the preliminary examination was over, the circuit court of Jefferson county opened its fall session, Judge Richard Parker presiding; a grand jury was impaneled, charged by the court, and sent to their room.

On the next day, October 26th, the grand jury returned a true bill against the five prisoners, Brown, Stevens, Coppoc, Copeland, and Shields Green (the last two negroes) for treason, advising and conspiring with slaves and others to rebel, and for murder, each offense punishable with death. Thomas Rutherford was foreman of this grand jury. (Cook and Hazelett were subsequently arrested, indicted, and tried.) The prisoners were brought into court; Faulkner had declined to act as counsel for the defense, and Thomas C. Green, the mayor of Charlestown, had been appointed in his stead. The prisoners elected to be tried separately, and the commonwealth elected to try Brown first. Upon this arraignment, and before the indictment was read, Brown again asked for a postponement; his address much more respectful than that delivered the day previous to the examining justices, and his request was based upon his physical condition, making no mention of any desire to obtain other counsel. This request was presented by his attorneys. The court called the jail physician, who testified that Brown's condition was not such as to preclude his giving proper attention to the details of his trial. The court overruled the motion, and the trial was begun. Whilst the indictment was being read, Brown was supported by two of the court officers, and when it was ended he lay down upon a cot which had been placed in the court room for his use. Many of those who attended the trial have supposed that Brown need not have used this cot as continuously as he did; as a matter of fact, he spent a large part of his time there, and appeared to be but little interested in what was transpiring. He made no suggestions and gave no assistance to his counsel, but he kept sufficiently abreast of the proceedings to interpose whenever it suited him to do so.

Twenty-four veniremen had been summoned for the trial; four of these were rejected and others summoned from the bystanders. Fourteen of the bystanders were summoned before the four vacancies were filled. The panel being complete, the prisoner struck off eight, and from the remaining sixteen twelve were selected by lot, who constituted the jury.

The prisoner was remanded to jail and the court adjourned until the next day. Thus ended the first day of John Brown's trial.

It does not appear just how searching the examination of these jurors was; it is remarkable, however, that in the then condition of the public mind and the universality of the feeling, that twenty-four jurors, free from exception, should have been obtained out of the first thirty-eight persons called.

When the court assembled the next morning the crowd had not diminished, nor was the military display any less imposing.

As soon as the court assembled, Mr. Botts again moved for a delay, stating that he had information to the effect that there was insanity in Brown's family, and he desired a short time to investigate and obtain the evidence. In the midst of Botts' plea the unexpected took place. Brown rose from his cot, and addressing the court, he denied that there was any insanity in his father's family, denied that he was mentally defective, and took issue with the position of his attorney. Botts was taken by surprise, and did not further press the matter; but Mr. Green, his associate, after explaining his embarrassment at the situation, insisted that they were entitled to make an investigation. Mr. Hunter made a short reply. The court ruled that the request could not be considered, there being no sworn statement in support of the defense of insanity.

The opening statements were made by the attorneys for the commonwealth, and the defense and the examination of the witnesses begun. The commonwealth introduced a number of witnesses who testified to the facts as to the raid, practically agreeing in all the important details, and varying only to the extent men will differ in stating facts of any given transaction. It was shown that Fountaine Beckham, the mayor of Harper's Ferry, and several of its citizens, were killed by Brown and his men.

Some correspondence between Brown and J. R. Giddings, the leading abolitionist in Ohio, Gerrit Smith, and perhaps others, together with certain documentary evidence, which included a copy of the constitution and ordinances which had been framed by Brown for the government of his followers, and which were found at the Kennedy farm, were introduced in evidence.

The preamble to this constitution was in the following words:

A. Whereas slavery throughout its entire existence in the United States is none other than the most barbarous, unprovoked and unjustifiable war of one portion of its citizens against another portion, the only conditions of which are perpetual imprisonment and hopeless servitude or absolute extermination; in utter disregard and violation of those eternal and self-evident truths set forth in our Declaration of Independence; therefore, we, the citizens of the United States and the oppressed people, who by recent decision of the Supreme Court, are declared to have no right which the white man is bound to respect, together with all the other people degraded by the laws thereof, do for the time being ordain and establish for ourselves the following provisional constitution and ordinances, the better to protect our people, property, lives, and liberties, and to govern our actions.

One of the articles (No. 46) provided: "The foregoing articles shall not be construed so as in any way to encourage the overthrow of any state government, or of the general government of the United States, and we look to no dissolution of the Union; but simply to amendment and repeal; and our flag shall be the same that our fathers fought under in the Revolution."

The court adjourned for the day, before the commonwealth had completed its testimony.

The constitution and ordinances referred to were adopted by a convention called by Brown, and denominated by him a "provisional constitutional convention," which met at Chatham, Canada, on Saturday, May 8, 1858, and which was composed in the main of the men who had followed him from Kansas and such sympathizers as he had been able to gather in the neighborhood of Chatham.

It was presided over by a negro preacher named Moore, and Kagi was its secretary; Brown himself being its ruling spirit.

This constitution provides the qualifications for citizenship, for a Congress composed of only one house, a President, a Secretary of State, a Secretary of War, a Treasurer, a Secretary of the Treasury, and a Commander-in-Chief of the Army, prescribing the duties of each, and provides generally, though in a crude sort of fashion, for the conduct of the government and the organization of the Army.

Attached to this paper is a schedule which provides that the president of the convention should call another convention to fill all the offices provided for, and issue commissions to those elected. Much discussion seems to have taken place over the adoption of article 46, but it was finally adopted with only one dissenting voice.

Immediately after the adjournment of this convention, the convention for the election of officers met in the same building; not being able to complete its labors that evening, it adjourned till Monday, May 10th, when it concluded its business and the final adjournment was had.

This convention elected the following officers: Commander-in-Chief of the Army, John Brown; Secretary of War, J. H. Kagi; Secretary of State, Richard Realf; Treasurer, Owen Brown; Secretary of Treasury, Jas. B. Gills; Members of Congress, Alfred M. Ellsworth and Osborne Anderson; and appointed a committee, of which John Brown was chairman, with full power to fill, by election, all offices provided for by the provisional constitution which might be vacant after the meeting adjourned.

This convention elected Thos. M. Kennard to the position of President, but Kennard was present and declined the honor; it then elected J. W. Loguen, he was not present, but great doubt was expressed as to his acceptance, and the matter was left in the hands of the committee above referred to.

None of these persons seem ever to have attempted to perform any of the duties devolving upon them except John Brown, who, as Commander-in-Chief, organized his forces, and some seventeen months later, began war at Harper's Ferry.

When, on the third day of the trial (October 28th), the court had convened and the trial was about to proceed, a young man, apparently but little more than twenty-one years of age, arose in the bar and announced that his name was George Henry Hoyt, of Boston, a member of the bar, who had come all the way from Massachusetts to defend the prisoner. Of his coming neither Brown nor anyone else knew. The prisoner's counsel were not disposed to permit this interference, but when Brown insisted that he should be allowed to appear, they withdrew their objection. Mr. Hunter, however, did oppose his appearing. He suggested that Hoyt was a mere boy; that he had produced no evidence of the fact that he was a practising attorney, and, in view of his self-appointment, the court should require satisfactory evidence of his right to appear.

Judge Parker, unwilling to deprive the prisoner of any aid which he might be able to obtain, decided to dispense with formal proof in the matters, and Hoyt was duly sworn in as counsel for the defense. This matter being settled, the commonwealth proceeded with its testimony, pursuing the same lines followed the day before, and then rested its case.

The time had arrived for the defense to introduce its testimony; there had been no direct evidence to show that Brown, personally, had inflicted a single wound or injury upon anyone during the conflict. There were some technical objections to be made to the indictment, or rather to the relevancy of the testimony introduced under it. It was the purpose of the attorneys for the defense to make the most of these matters, but Brown had his own ideas; he had determined the lines along which the defense was to proceed, and he was unwilling that any other course should be pursued. He had caused certain witnesses to be summoned, and he demanded that his counsel should follow the path that he had marked out. In vain Botts and Green protested; Brown was immovable, and

they were finally forced to submit to his dictation.

The witnesses introduced for the defense were for the most part the gentlemen whom he had held as hostages, and the object of their testimony was to show that he was humane and considerate in the treatment of his prisoners, and did not desire unnecessarily to shed blood. This, together with the testimony showing what he alleged to be the improper treatment received by the men sent by him to negotiate terms of surrender, and especially as to the killing of Thompson, one of his men, was about all he had to offer.

The attorneys for the commonwealth opposed the admission of this class of testimony, but the attorneys for the defense persisted, and in one way and another succeeded in getting all the testimony before the jury, as irrelevant as it appears to have been.

Several of the witnesses for the defense failed to answer when called, but all the facts were before the jury. These witnesses would only have been cumulative.

When it appeared that the defense had about exhausted its testimony, and the trial was nearing its conclusion, Brown rose and proceeded to deliver a speech of denunciation and appeal. The trial, he declared, was a farce. His witnesses had not been compelled to appear; his counsel were not to be relied on; and he demanded that the case be adjourned and he be given further time.

No sooner was he seated than Messrs. Botts & Green retired from the case, after expressing their surprise and disgust at the reflection which had been made upon their conduct.

Thus young Hoyt was left alone in the case; and never did a young man face a more trying ordeal; he had just come to the bar, and was without experience; he was unacquainted with the law and the practice of the Virginia courts.

Messrs. Green & Botts, although their connection with the case was ended, seconded the efforts of Hoyt, and agreed to give him such aid and assistance as they could to enable him to prepare the case.

The court granted the request and adjourned until the next day; and so ended the third day of the trial.

On October 29th, the fourth day of the trial, when the court assembled, Mr. Samuel Chilton, of Washington, and Mr. Hiram Griswold, of Cleveland, Ohio, both lawyers of ability and standing, who had been secured by Brown's friends, appeared in court and were admitted as counsel for defendant.

Some time was consumed by these gentlemen in the effort to advise themselves as to the situation; a little testimony to the same effect as that given the day before was submitted.

The instructions to the jury were obtained without much delay, Mr. Harding made the opening argument for the commonwealth, and the fourth day of the trial passed into history.

The next day being Sunday, the court adjourned until Monday, October 31st.

The crowd in attendance suffered little or no diminution by the intervention of the Sabbath; Monday morning found the populace as much interested as formerly.

This, the fifth day of the trial, was consumed in the arguments of counsel, which were concluded in the early afternoon. No statement of these speeches seems to have been preserved. The known ability of the participants is a guaranty that they were forceful and able. After a short absence the jury returned into court, having found a verdict in the following words: "We, the jury, find the defendant, John Brown, the prisoner at the bar, guilty of treason, advising and conspiring with slaves and others to rebel, and for murder in the first degree;" signed by J. C. Wiltshire, foreman.

When the jury filed into the court room a solemn hush fell upon the audience. During an intense silence, the clerk read the verdict, and the jurors gave their assent thereto.

The verdict met with approval of all in that vast gathering; yet there was no applause, no expression of approval; silently the crowd passed from the court room, and soon after dispersed.

Brown himself received the verdict with perfect composure; he merely turned upon his cot, as if seeking a more

comfortable position. He did not believe the sentence would ever be executed; but if he had believed otherwise, he was possessed of too much nerve to weaken in the presence of his enemies.

On November 2d, Brown was brought into court for sentence. When asked by the court if he had anything to say why the court should not pass judgment upon him, he said:

"I have, may it please the court, a few words to say. In the first place, I deny everything but what I have all along admitted, the design on my part to free slaves. I intended certainly to have made a clean thing of that matter, as I did last winter when I went into Missouri and there took slaves without the snapping of a gun on either side, moved them through the country, and finally left them in Canada. I designed to have done the same thing on a larger scale. That was all I intended. I never did intend murder or treason, or the destruction of property, or to excite or incite slaves to rebellion, or to make insurrection.

"I have another objection; and that is, it is unjust that I should suffer a penalty. Had I interfered in the manner which I admit, and which I admit has been fairly proved (for I admire the truthfulness and candor of the greater portion of the witnesses who have testified in this case), had I so interfered in behalf of the rich, the powerful, the intelligent, the so-called great, or in behalf of any of their friends, father, mother, brother, sister, or wife or children, or any of that class, and suffered and sacrificed what I have in this interference, it would have been all right; and every man in this court would have deemed it an act worthy of reward, rather than punishment.

"This court acknowledges, as I suppose, the validity of the law of God. I see a book kissed here which I suppose to be the Bible, or, at least, the New Testament. That teaches me that all things whatsoever I would that men should do to me, I should do even so to them. It teaches me further to 'remember them that are in bonds, as bound with them.' I endeavored to act up to instruction. I say I am yet too young to understand that God is any respecter of persons. I believe that to have interfered as I have done, as I always freely admitted I have done, in behalf of His despised poor, was not wrong, but right. Now, if it is deemed necessary that I should forfeit my life for the furtherance of the ends of justice, and mingle my blood further with the blood of my children and with the blood of millions in this slave country whose rights are disregarded by wicked, cruel, and unjust enactments, I submit; so let it be done!

"Let me say one word further.

"I feel entirely satisfied with the treatment I have received on my trial. Considering all the circumstances, it has been more generous than I expected. But I feel no consciousness of guilt. I have stated from the first what was my intention and what was not. I never had any design against the life of any person, nor any disposition to commit treason, or excite the slaves to rebel, or make any general insurrection. I never encouraged any man to do so, but always discouraged any idea of that kind.

"Let me also say a word in regard to the statements made by some of those connected with me. I hear it has been stated by some of them that I have induced them to join me. But the contrary is true. I do not say this to injure them, but as regretting their weakness. There is not one of them but joined me of their own accord, and the greater part of them at their own expense. A number of them I never saw, and never had a word of conversation with till the day they came to me; and that was for the purpose I have stated.

"Now I have done."

Again a solemn hush fell upon the crowd; for a moment there was a pause; then Judge Parker calmly sentenced the prisoner to be hanged on the 2d day of December, 1859, by the sheriff of Jefferson county; not in the jail yard, but at such other place in the county convenient thereto as the said sheriff might select.

The defendant tendered, and the court signed, three bills of exceptions taken to certain rulings of the court made during the trial.

Brown was borne back to jail, the

crowd in the court room not being permitted to move till he was safely in its walls.

So far as I can find there is no copy now extant of the bills of exceptions taken during the trial, and I have been unable to ascertain upon what ground they were based.

A petition for a writ of error was prepared and presented to the court of appeals by no less a lawyer than Mr. William Green, in which it is said that the whole field of legal learning, so far as applicable to the questions at issue, was exhausted. The writ was refused.

The State Militia was kept on guard in Charlestown from the date of the trial until the day of the execution.

December 2, 1859, was an almost perfect day; when the hour for the execution arrived Brown, unaided, walked from his cell into the wagon which awaited him at the jail door, and took his seat upon his coffin. As he ascended the hill on which the gallows stood, casting his eyes around over the landscape, he quietly remarked to those about him, that it was a beautiful day, and a most beautiful country.

He ascended the gallows firmly and without a tremor. Spying a lone colored woman on the edge of the crowd, he waved his hand towards her and said, "Remember I die a martyr for your race." When the time came to place the cap upon his head, he took off the old hat he wore and tossed it from him, as if to say, "I have no further use for you."

He had no statement to make. He declined to accept the services of any clergyman, though they were offered. With as little delay as possible the rope which held the trapdoor on which he stood was cut, and John Brown's earthly career was ended.

Democracy of the Dead

In the democracy of the dead all men at last are equal. There is neither rank nor station nor prerogative in the republic of the grave. At this fatal threshold the philosopher ceases to be wise, and the song of the poet is silent. Dives relinquished his millions and Lazarus his rags. The poor man is as rich as the richest, and the rich man is as poor as the pauper. The creditor loses his usury, and the debtor is acquitted of his obligation. There the proud man surrenders his dignities, the politician his honors, the worlding his pleasures; the invalid needs no physician, and the laborer rests from unrequited toil.

Here at last is nature's final decree in equity. The wrongs of time are redressed. Injustice is expiated, the irony of fate is refuted; the unequal distribution of wealth, honor, capacity, pleasure and opportunity, which makes life such a cruel and inexplicable tragedy, ceases in the realm of death. The strongest there has no supremacy, and the weakest needs no defense. The mightiest captain succumbs to that invincible adversary, who disarms alike the victor and the vanquished.—Hon. John J. Ingalls.

Trial By Battle

*BY WILLIAM R. VANCE, PH.D.**

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SUPPOSE we go back only so far as the reign of Queen Elizabeth, to the year 1571, a few years before Shakespeare was beginning to play in London and to observe lawyers and their ways, when the famous case of Lowe v. Paramour, 3 Dyer, 301a, came on to be heard on a writ of right before the bench. The whole trouble came from the shifty business methods of a youth named Chevin, who was seised of certain land in the county of Kent. This land was conveyed by Chevin to Paramour by means of a fine levied. Subsequently, and, I suppose, after Chevin had gotten Paramour's money, he had the conveyance set aside by legal proceedings, on the ground that he was under age. Then, having in the meantime reached his majority, this ingenious lad sold and conveyed the land again to Lowe. But Paramour, the first purchaser, declined to surrender possession, thus leaving all parties excepting the prosperous infant, in a highly litigious state of mind. Paramour went into chancery, and had that court to find that the youthful swindler was twenty-one, the first conveyance valid, and the second, to Lowe, void. But Lowe would not be so easily beaten. Ignoring the decree of the chancery court, Lowe brought his writ of entry against Paramour, but the jury found against him. More furious than ever, Lowe then brought attaint against Paramour and the petit jury, on the ground that the jury had wilfully brought in a false verdict, and should on that account be outlawed. But when the grand jury of twenty-four, before whom the attaint was tried, also found the issue against him, Lowe's rage was so great that he was ready to go to the limit. He brought the formidable writ of right against his opponent. By this time Paramour's patience was quite exhausted,—in fact, he was fighting mad. So he demanded trial by battle. The rest of the story will be told in the quaint words of Chief Justice Dyer, who presided:

"And Paramour chose the trial by battle, and his champion was one George Thorne; and the demandants e contra, and their champion was one Henry Nailer, a master of defence. And the Court awarded the battle; and the champions were by mainprise and sworn to perform the battle at Tothill, in Westminster, on the Monday next after the morrow of the Trinity, which was the first day after the Utas of the Term, and the same day given to the parties; at which day and place a list was made in an even and level piece of ground, set out square, s. sixty feet on each side due East, West, North and South, and a place or seat for the Judges of the Bench was made without and above the lists, and covered with the furniture of the same Bench in Westminster Hall, and a bar made there for the Serjeants at law. And about the tenth hour of the same day, three Justices of the Bench, s. Dyer, Weston, and Harper, Welshe being absent on account of sickness, repaired to the place in their robes of scarlet, with the appurtenances and coifs; and the Serjeants also. And their public proclamation being three times made with an Oyes, the demandants first were solemnly called, and did not come. After which the mainpernors of the champion were called, to produce the champion of the demandants first, who came into the place apparelled in red sandals over armor of leather, bare-legged from the knees downward, and bare-headed, and bare-arms to the elbow, being brought in by the hand of a Knight,

*From Address before South Dakota Bar Association.

namely, Sir Jerome Bowes, who carried a red baston of an ell long, tipped with horn, and a Yeoman carrying a target made of double leather; and they were brought in at the north side of the lists, and went about the side of the lists until the middest of the list, and then came towards the bar before the Justices with three solemn congies, and there was he made to stand at the south side of the place, being the right side of the Court; and after that, the other champion was brought in like manner at the south side of the lists, with like congies, etc., by the hands of Sir Henry Cheney, Knight, etc., and was set on the north side of the bar; and two Serjeants being the counsel of each party in the midst between them; this done, the demandant was solemnly called again, and appeared not, but made default; upon which default, Barham, Serjeant for the tenant, prayed the Court to record the nonsuit; which was done. And then Dyer, Chief Justice, reciting the writ, count and issue, joined upon battle, and the oath of the champions to perform it, and the fixing of the day and place, gave final judgment against the demandants, and that the tenants should hold the land to him and his heirs for ever; quit of the said defendants and their heirs for ever; and the demandants and their pledges to prosecute, in the Queen's mercy, etc. And then solemn proclamation was made, that the champions and all others there present (who were by estimation above four thousand persons) should depart, every man in the peace of God and the Queen. And they did so, cum magno clamore 'Vivat Regina.'"

This proceeding thus so graphically described by Chief Justice Dyer seems to us so ludicrous when regarded as a method of determining the justice of a cause, that we can scarcely conceive how it was possible for the people, even in Queen Elizabeth's day, to allow such a mockery of justice to persist. But it is evident that the lawyers of that day were not so clear that this procedure was unwise, for no movement whatever seems to have been made to have trial by battle abolished. It seems to have flourished through the next century, and even Milton, who was quite an insurgent in his day, in his methodical fashion makes the following entry in his note book:

"De Duellis: Not certain in deciding the truth, as appears by the combat fought between 2 Scots before the L. Grey of Wilton in the market place of Haddington, wherein Hamilton, that was almost if not clearly known to be innocent, was vanquish't and slain, and Newton the offender remained victor and was rewarded by the Ld. Grey."

The lawyer's characteristic unwillingness to make any fundamental change is well illustrated by the fact that as late as 1819 trial by battle was claimed, and, after long argument on technical points, was gravely allowed by the court of King's bench in the case of Ashford v. Thornton, 1 Barn & Ald. 405. We are not surprised that such a performance by the courts created amazement throughout England, and resulted in the speedy abolishing of this relic of barbarism in the same year.

You will perhaps be disposed to say that this is a strange and exceptional instance of the ultra-conservatism of our profession in conserving not only a useless and obsolete but barbarous method of trial some five hundred years longer than was reasonable. But we need not search far into the history of our common law to find other legal anachronisms little less shocking. For instance, in 1824, the case of King v. Williams, 2 Barn. & C. 538, came before the King's bench. The plaintiff brought debt on a simple contract, and came into court full-handed with proof, but the defendant pleaded nil debet per legem, that is, waged his law. When the issue was joined, the defendant swore that he did not owe the debt, and brought eleven compurgators who swore, in turn, that they believed the defendant. Under these circumstances the plaintiff had nothing to do but to abandon his action. Despite the gross injustice of such a proceeding, trial by wager of law still continued to be legal in England until it was swept away by statute in the great tide of reform that broke upon England in 1833.

A Notable Trial Involving Witchcraft

BY AMOS FOSTER

IT IS generally supposed that the last trial for witchcraft, in an American court, took place in the ancient town of Salem, in the Colony of Massachusetts, nearly two centuries ago. This popular impression is erroneous. I don't know just when the latest defendant stood before the court charged with killing a witch, but in the year 1903 two alleged witch killers were found guilty of the charge of homicide, and sentenced to a long term of imprisonment in the insular prison of Bilibid, in the city of Manila.

The difference between the witchcraft trials of the present day in the city of Manila, and those of the seventeenth century in the town of Salem, is that the defendant in the former cases was charged with killing the witch, and in the latter with the crime of being a witch. In the former he was convicted and sentenced to imprisonment for homicide; in the latter she was found guilty of unhallowed dealing with the Devil, and sentenced to be hanged by the neck until she was dead. The crime to-day in the Philippines is witch killing; the offense in the days of old in New England was practising witchcraft; and it is doubtful whether the witchkiller in the days of our forefathers would not have been regarded as a personage worthy of respect for the commission of a commendable act.

The Filipino witch, known as the Aswan, is said to assume the shape of a bird or animal, with which it roams the forest or flies in and out among the trees of the cocoanut grove or the clumps of bamboo at night. The favorite shapes assumed by the Aswan are those of a black pig or dog, or the vampire bat or calao, the latter being an ungainly bird of the heron species. These unholy night prowlers seek the bodies of the dead, or old, sick, and decrepit, or very young children, which they bear away and devour. If a strange black dog or pig be seen near the house at dusk, or a great vampire bat, with dusky pinions, skim along the tops of the cocoanut trees surrounding the house as darkness comes on, then beware the Aswan! If an aged, sick, or feeble person or little child be in the dwelling, keep close watch and guard least the Aswan enter and drag the helpless inmate therefrom, and bear him away to the depths of the forest, or the distant morass, or to the inaccessible mountain top, there to be devoured at leisure, the captor beginning his repast by tearing the liver from the breast of his victim, which he greedily devours.

The existence of witches and of witch killers, and of the trial of the latter, is attested by the records of the Supreme Court of the Philippines, as well as those of the Courts of First Instance. The leading case was that of Los Estados Unidos contra Melecio Macalintal et Isidoro Paled, the two defendants being accused of homicide under the following circumstances: Isidoro the son, and Melecio the son-in-law, of Anicita, returning home, found the old woman suffering from some unknown malady. As she obstinately refused to divulge the cause of her illness, Isidoro began beating his mother with a stick, whereupon she confessed to having been bewitched by old Saturnina, the Aswan. The sons thereupon betook themselves to Saturnina's abode, and begged her to remove the evil spell from their mother, which she promised to do, assuring them that upon their return home

they would find Anicita in her usual good health.

Confiding in the good faith of the Aswan they returned home to find their mother worse than ever. The sons then resolved upon heroic measures. Taking their spears and bolos, they again sallied forth, determined to free their mother from the spell and rid the neighborhood of the Aswan. They entered the dilapidated hut, and, dragging the old woman to a stream near by, threw her in, and repeatedly submerged her in the water. One of the tormentors, noticing a pair of scissors, took them and cut off one ear, after which they continued submerging and resubmerging for a while, varying the performance by cutting off the other ear. Finally her head struck a rock, or exhaustion overcame her, and the sufferings of their victim were ended.

The Supreme Court modified the sentence awarded by the trial court on the ground, that a belief in witchcraft, sincerely entertained by the defendants, which belief prompted the act, should have been taken into consideration by the lower court in fixing the penalty. We believe in this instance the Supreme Court was right, and rendered a righteous decision in laying down the doctrine that when actuated by the belief that the victim was an Aswan, and that she had cast an evil spell upon a member of the slayers' family, thereby causing its death, such belief should reduce the grade of the offense.

This doctrine is just to the ignorant mountain people of the Philippines of today, since among all people, in all quarters of the globe, in all ages, witchcraft has at some period exercised its potent sway; but it would be an unsafe doctrine to extend to a more enlightened generation, who might invoke it as a cloak to cover murder prompted by anger, revenge, avarice, jealousy, or any of the baser passions.

Amos Foster

A Dream

I chanced one day by Heaven's door
  And saw Saint Peter standing there.
In both his arms, it seemed, he bore
  A thousand bundles—each a prayer.

With greatest zeal he looked them o'er
  And read what every one did ask;
Then some he laid aside and bore
  Away—and then renewed his task.

I fearlessly stepped nearer, to get a better view
  My curious nature made me dare—
And said—"Why do you bear a few
  Away, and leave the others there?"

"These to my Master go," he said,
  "For speedy answer they require,
While these," he wisely shook his head,
  "Tell of conditions not half so dire."

"What one is this?" I asked him there,
  "That with it to the Lord you go?"
He answered—" 'Tis a lawyer's prayer
  For food, drink, and clothing down below."

RUSSELL CONWELL FISH.

Henry Crabb Robinson

BY ALVIN WAGGONER

of the Philip (S. D.) Bar

AMONG the lawyers of the nineteenth century none other was so much given to literature, and especially literary associates, as Henry Crabb Robinson. His own literary work, though not of highest quality, was considerable in bulk. At various times he was a correspondent of the Times, and also one of its associate editors. He was an inveterate diarist, and at his death left many manuscript volumes of an intimate personal diary, journals of tours, and selected correspondence. Two volumes of selections from this great mass of manuscripts have been published, but the editor estimates that the published volumes do not comprise more than one twentieth of the whole. Nevertheless, they furnish us with what is possibly our most intimate view of literary and social London from the beginning of the century to 1867, the date of Robinson's death.

It is doubtful if any other lawyer has had such a wide personal acquaintance with literary people as Henry Crabb Robinson. In his student days he became intimately acquainted with Goethe and Schiller. In France, one of his first clients was Madam De Stael, for whom he prepared a contract with her publisher. In England, he numbered among his correspondents Hazlitt, Lamb, Leigh Hunt, Southey, Coleridge, Wordsworth, and Godwin, as well as a host of lesser celebrities. Indeed, he seems to have been something of a literary hero worshiper,—not unlike Boswell, except that he embraced all the writers of the day in the scope of his affections. He discussed German literature and philosophy with Coleridge, and, later, with Carlyle. He played whist with Charles Lamb, and was the self-appointed guardian and protector of Mary Lamb during those last, lonely ten years of her life. He was a friendly and critical listener at the lectures of Hazlitt. But his closest literary friend was William Wordsworth. Their intimacy bordered on affection. Indeed, it has been suggested that no man ever approached closer to the somewhat unsociable heart of Wordsworth than Crabb Robinson. They were on various occasions traveling companions on tours through France, Italy, and Scotland. During the last years of Wordsworth's life Robinson was a regular Christmastide visitor of the poet; and we find Mrs. Wordsworth writing to urge more frequent visits, on the plea that no one except Robinson could win Wordsworth away from the gathering moroseness of those declining years.

But Crabb Robinson was not devoted to literature as a means of gaining a livelihood, as were so many of his associates. He was, in the strictest sense of the word, a lawyer, and his active business life was devoted assiduously to his profession.

It is set down in his diary under date of May 8, 1813: "In the evening went to the Temple, where I learned that I had been called to the bar." He observes that "according to the usual age at which men begin practice, I was already an old man, being thirty-eight." His success seems to have been immediate; for it was only two months later that he mentions the fact that he was consulted by Madam De Stael, and in August of the same year he successfully defended a client charged with murder. Yet evidently he encountered the usual discouragements of the beginner; for in July, 1814, we find him writing to a friend: "You will expect to hear of the success of my Sessions Circuit. It was not so productive as I expected, from the retirement of Twiss, but this was more from want of business

than from preference of others before me. . . . However, my individual success is great; the decline of professional business in general is enough to alarm a man now entering into it. Lawyers have had their days!" That last sentence, it may be remarked, was written just a century ago. Since then it has been re-echoed by others until the sentiment has become trite; yet the legal profession manages in some manner to persist.

During the same year Robinson made a notable journey to Paris, meeting, among others in the French capital, La Fayette, with whom he had much talk regarding the new American nation, in whose fortunes the French soldier was then much interested. But of chief interest to lawyers is Robinson's account of the French courts, surveying ground frequently covered by English and American lawyers since that time.

"I several times attended French courts of justice, and heard both arguments before judges and trials in criminal cases before juries. I have no remark to make on the arguments, for I never understood them sufficiently; and, indeed, I very imperfectly understood the examination of witnesses; but I did understand enough to enable me to come to this conclusion, that if I were guilty, I should wish to be tried in England,—if innocent, in France." Making this remark once to Southey, he changed the expression, and said: "The English system seems to have for its object that no innocent person should be unjustly found guilty,—the French system, that no criminal should escape." Now, if it be the fact that of the accused by far the greater number are guilty, it will follow that injustice is more frequent in the English than in the French courts.

"It is customary for the admirer of English law to boast of that feature of it which prohibits all attempts to make the prisoner convict himself, as if the state represented in the court had not a right to the truth, and as if a man who had violated the law were privileged through the violation. This surely betrays want of discrimination. It is right that no violence should be used to compel an answer, because that may as often produce falsehood as truth,—nor is any used in the French courts; but the prisoner is interrogated, as well as the prosecutor and witnesses, and the same means are used to detect falsehood in all. If he refuse to answer, he is made to understand the unfavorable inference that will be drawn. And this interrogation taking place before the public, no great injustice can be done. On this point I entirely approve of the French practice." Robinson also noted another feature that has never failed to arouse the comment of lawyers devoted to an Anglo-Saxon system of courts. "There is always an advocate (Procureur du Roi) who represents the Crown, and who gives his judgment as between the prosecutor and the accused; and he retires with the judges."

The diary also furnishes us with an intimate glimpse of the chambers of the English lawyer of a hundred years ago: "I went to Sergeant Frere's chambers, 3 King's Bench Walk, and agreed for a fourteen years' lease of them from next midsummer at seventy-five guineas per annum. These chambers consist of one tolerably sized room; a second, which, by pulling down a partition, may be made into a very comfortable room; and a third small room, which may be used by a clerk; three fireplaces. Between the two larger rooms is a small room, large enough to place a bed in, and convenient for that purpose; there is also a dark place, in which a bed has been placed for Frere's clerk and his wife; besides, one or two lock-up places. The chambers, without being excellent, are good for the price, and I am pleased at the idea of occupying them. They are quite light and look into a garden, and the staircase is handsome, compared with my present one."

As might be supposed, Crabb Robinson was exceedingly human. His correspondence and daily jottings in his diary abound in much intimate talk about clients, briefs, fees, the Inns of Court, and even the judges. Five pounds seems to have been the customary retainer, and it is interesting to note that at no time during his practice did Robinson's annual fees run above eight hundred pounds. The average was

about five hundred. But Crabb Robinson was a man of exemplary habits, and a little money, with him, seems to have gone a long way. He remarks what has always been a noticeable fact, namely, that some of the ablest and most industrious members of the profession died poor, without apparent fault on their part, while far less deserving colleagues without noticeable skill or application, managed to amass fortunes.

Robinson repeats many stories of the judges, Lord Eldon and Lord Mansfield among the rest. The latter, struggling with a congested calendar, on one occasion announced that he would hold court on Good Friday. At once there was rebellion on the part of the barristers. Sergeant Davey, with some warmth and more humor, arose and said, "There has been no precedent since the days of Pontius Pilate." Nevertheless, Mansfield held court with the attorneys, and without the barristers.

Another one that deserves to be resurrected from the diary is as follows: "One day when someone remarked, 'Christianity is part and parcel of the law of the land,' Rolfe said to me, 'Were you ever employed to draw an indictment against a man for not loving his neighbor as himself?' "

Under date of November 17, 1817, Robinson gives an account of the last wager of battle seen in an English court. Blackstone was under the impression that the procedure had long been obsolete, but evidently he was mistaken!

"I witnessed to-day a scene which would have been a reproach to Turkey or the Emperor of Dahomey,—a wager of battle in Westminster Hall. Thornton was brought up for trial on an appeal after acquittal for murder. No one seemed to have any doubt of the prisoner's guilt; but he escaped, owing to the unfitness of a profound real property lawyer to manage a criminal trial. For this reason public sense was not offended by recourse being had to an obsolete proceeding. The court was crowded to excess. Lord Ellenborough asked Reader whether he had anything to move, and he having moved that Thornton be permitted to plead, he was brought to the bar. The declaration or count being read to him he said: 'Not guilty. And this I am ready to defend with my body.' And at the same time he threw a large glove or gauntlet on the floor of the court. Though we all expected this plea, yet we all felt astonishment—at least I did—at beholding before our eyes a scene acted which we had read of as one of the disgraceful institutions of our half-civilized ancestors. No one smiled. The judges looked embarrassed. Clarke on this began a very weak speech. He was surprised, 'at this time of day,' at so obsolete a proceeding; as if the appeal itself were not as much so. He pointed out the person of Ashford, the appellant, and thought the court would not award battle between men of such disproportionate strength. But being asked whether he had any authority for such a position, he had no better reply than that it was shocking, because the defendant has murdered the sister, that he should then murder the brother. For which Lord Ellenborough justly reproved him, by observing that what the law sanctioned could not be murder. Time was, however, given him to counterplead, and Reader judiciously said in a single sentence, that he had taken on himself to advise the wager of battle, on account of the prejudices against Thornton, by which a fair trial was rendered impossible."

The appellant at the following term set out all the evidence in replication, and there followed a long succession of pleading, during which the prisoner remained in jail. According to the old law the court could have awarded battle, and, if the appellant refused, ordered him hanged. To escape the situation, Parliament passed an act abolishing both the wager of battle and the appeal. Not, however, until Tindal and Chitty had argued the case with much learning, and much black-letter and French lore were lavished in the English courts for the last time.

Alvin Waggoner.

"Military Rights Versus Civil Rights"

BY EUGENE S. BIBB

of the Minneapolis Bar

THE commander of a military reservation in his relation to the civil authority is bound to perform certain duties which naturally follow from his character as a representative of the power and dignity of the United States government. Yet in the fulfilment of the obligations arising from these duties he must be guided constantly by the precept that military authority is subordinate to civil when both are found on common ground, and that the national and state sovereignties are coexistent and must be so considered in certain cases, each in its proper sphere.

To give a clear and concise statement of the rules of law governing the relation of military authority to civil, in times of peace, in so far as the duties of a commander of a military post are involved, and to make plain the proper manner of maintaining the ascendancy of the sovereignty of the United States when appropriate to do so, is the purpose of this thesis. The subject was suggested to the writer as one of merit by his study of Constitutional Law.

The event of friction between the two sovereignties, national and state, is made possible only when one encroaches upon, or attempts to encroach upon, the legitimate jurisdiction belonging exclusively to the other. Therefore a clear understanding of the scope of these jurisdictions at once defines the limits of the powers of each, and points out unmistakably the rights and duties of each authority with relation to the other.

Arrest on a Military Reservation.

Soldiers at their enlistment and officers upon the acceptance of their commissions immediately change their legal status; they add to their liability, for then they become amenable to military laws while still retaining their amenability to the civil laws,—Federal, state, and municipal. Naturally it follows, then, that a man in the military service sometimes finds that the Federal, state, or municipal laws have been violated by him, outside the military reservation. He learns that a warrant is to be served on him by the civil authorities.

The post commander now discovers these circumstances. He will not permit that the sovereignty of the United States, which it is his sworn duty to guard jealously, be infringed upon, and still he is desirous of not appearing to shield the accused from just punishment for his deed.

If the culprit is still at liberty the post commander is required "to use the utmost endeavor to deliver the accused over to the civil authorities and to aid the officers of justice in apprehending and securing him. The commanding officer, before surrendering the party, is entitled to require that the application shall be sufficiently specific to identify the accused, and to show that he is charged with a particular crime or offense, which is within the class described in the article." (59th Article of War.) It has been held, further, that without a strict compliance with these requirements the commanding officer cannot properly surrender, nor the civil authorities arrest within a military reservation, an accused officer or soldier.

In the Digest of Opinions, J. A. G., page 35, it is said that "where it is doubtful whether the application is made in good faith and in the interests of law and justice, the commander may demand that the application be especially explicit and be sworn to; and the preferable and, in-

deed, only satisfactory course will be to require the production, if practicable, of a due and formal warrant or writ for the arrest of the party accused."

It is immaterial to the case whether the actual commission of the crime occurred before or after the accused entered the military service. It is obvious that if the contrary were true the Army would in a short time become a refuge for criminals at large. For if people knew that those in the military service were exempt from punishment by civil authority for crimes against the Federal, state, or municipal governments they could commit a crime and then immediately join the Army and be exempt from punishment therefor by the civil authorities, and also exempt from punishment by the military, for the crime was not committed during their service.

The proper and legitimate manner in which to effect the arrest by the civil authorities of a fugitive from justice serving in the military service of the United States is clearly pointed out in the case of Ex parte McRoberts, in the sixteenth Iowa Report, page 600. There the court laid down the rule that "any state officer has not the right to go to a company or regiment, or to go within the military lines, and by virtue of a state process to arrest any officer or soldier within such military control for an offense committed even outside of a military reservation. But it is the duty of such civil officer to stop at the boundary line between the two jurisdictions, and there demand of the military officers the delivery of the accused, if in their jurisdiction." It has been seen that it is the duty of the military officers to surrender the accused under conditions as enumerated in the 59th Article of War, hereinbefore quoted.

Now let us look at the question from another standpoint. Suppose that the accused is under arrest, or that the military jurisdiction has already duly attached with a view to trial. Now let us refer again to the Digest of Opinions, J. A. G., page 37, where it is stated that "the prisoner may be surrendered or not, as the proper authority may determine. A soldier under a sentence of confinement imposed by court martial cannot, in general, properly be surrendered." The proper authority named here is supposedly the next higher in rank, who may also refer the question to his superior.

The above statement embraces only those cases in which the crime was committed without the military reservation and consisted of violence against the person, as manslaughter, robbery, assault and battery, or affected a person in his property, as arson, burglary, or malicious mischief. (Winthrop, Military Law, p. 1075.)

In the case of where an officer or soldier is accused as indicated in the 59th Article of War, he should not be permitted to deliver himself up to the civil authorities or to appear in the civil court, even though he is willing or even desirous of doing so. He should be required to await the formal application of the civil officers.

The Articles of War were enacted by Congress and have the force and authority of statute law, being ordained in the exercise of the constitutional power of Congress to make the rules for the government and regulation of the land and naval forces. (Black on Constitutional Law, page 101.) From this it would seem to follow that this duty of surrender in certain cases corresponds to an analogous duty on the part of the civil officials.

Here another quotation from Winthrop on Military Law (page 1079) is competent. He says that "it follows that when the arrest of an officer or soldier at a military post is made without a previous demand, or after a demand not duly made in accordance with the 59th Article, and therefore not acceded to, the law is violated, the act is a trespass, and it is the right, as well as the duty, of the commander, to retake the prisoner from the custody of the civil officials and remand him to his former status. In so doing, the commander is entitled and properly required to use such military force as may be suitable to effect such purpose in an orderly manner; but before resorting to this means he will properly call upon the civil authorities to return the prisoner, allowing them a reasonable time for the purpose."

It is interesting to note at this place

that where the civil authorities do not presently apply for the accused under the 59th Article, it is the duty of the military authorities to proceed to exercise their jurisdiction and forthwith try the accused by military law. Ex parte Mason, 105 U. S. 699, 26 L. ed. 1214.

As a matter of comity between jurisdictions, the commanding officer will aid the service of a subpœna out of a civil court upon a member of the military service. The 59th Article of War does not embrace subpœna, however.

Service of Civil and Criminal Process.

In order to fully understand and grasp this division of the subject, it is necessary first to ascertain what the term "process" means and also what is included thereunder. Black's Law Dictionary may be quoted on this point as follows:

"The word 'process' is, in common-law practice, frequently applied to the writ of summons, which is the instrument now in use for commencing personal actions. But in its more comprehensive significance, it includes not only the writ of summons, but all writs which may be issued during the progress of an action. Those writs which are used to carry the judgments of the courts into effect and which are termed writs of execution are also commonly denominated 'final process.'"

From this it follows that civil and criminal process includes warrants, subpœnas, and in fact all the customary writs with the one exception of the writ of habeas corpus.

Where exclusive jurisdiction over the military reservation is vested in the United States, either by its having expressly reserved the same upon the admission of the state or by means of the subsequent cession of its own jurisdiction by the state, the persons stationed upon the premises become isolated as respects their civil relations. They are not subject to the service of the civil or criminal process of the local courts except—and here is an important exception—in so far as the right to execute the same may legally have been reserved to the state ceding the jurisdiction. This reservation is usually in the following form:

"Except the service upon such sites of all civil and criminal process of the courts of this state."

This would seem to be the logical place for the discussion of the service of the writ of habeas corpus, for all it is not included in the term "civil and criminal process."

In Tarble's Case, 13 Wall. 397, 20 L. ed. 597, the Supreme Court of the United States in 1871 adjudged that state courts have no power whatever to discharge a person on a writ of habeas corpus issuing out of such state court, when such person be held under authority of the United States by a military officer of that government. Should any state or municipal tribunal issue the writ in such a case, while the officer in charge of the petitioner and upon whom service is made is not, strictly, required to make any return to the same, he will, yet, as a matter of comity, always properly do so, so far as to advise the court that he holds petitioner by the authority of the United States, as an enlisted soldier or military convict. Should the state authorities attempt to take the soldier by force, they will be prevented by the commanding officer using only such military force as is necessary for the purpose. The writ of habeas corpus cannot issue under the reserving clause noted above, because the jurisdiction of the United States has attached, and hence state courts lack jurisdiction. However, if the officer commanding be served with a writ of habeas corpus, issuing from a United States court, he will make full return to same and obey it strictly. (U. S. Rev. Stat. §§ 751, 752, Comp. Stat. 1913, §§ 1279, 1280.)

On another question of jurisdiction, which is of interest here, the case of Barrett v. Hopkins, 2 McCrary, 129, 7 Fed. 312, may be cited as deciding the point. There it was held that the jurisdiction of a general military court-martial may always be inquired into by civil courts, upon the application of any party aggrieved by its judgment, and if such a court exceeds its authority and undertakes to try and punish a person not within its jurisdiction, its judgment is void, and may be so declared by any court having jurisdiction of the proper parties and subject-matter. Where a soldier in the Army of the United States was arrested for a

crime, and his term of enlistment expired before his trial and conviction by the court-martial, the jurisdiction of the court was retained for all purposes of the trial, judgment, and execution, it having once attached. (Citing Dynes v. Hoover, 20 How. 82, 15 L. ed. 844.)

Reserving Clauses in Acts of Cession of Jurisdiction by a State.

Now we come to an examination of these reserving clauses, heretofore mentioned.

The Constitution of the United States, article I. § 8, provides that Congress shall have power "to exercise exclusive legislation in all cases whatsoever over such district as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislation of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings."

Where the land is acquired for military posts in other ways than by purchase with the consent of the state legislature, as by cession by the state, the terms of the act of cession usually clearly define the limits and extent of the jurisdiction ceded. At this point a consideration of the case of Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995, may be instructive. In that case the railroad running in a military reservation resists state taxation. Now formerly the state of Kansas had ceded jurisdiction to the reservation of Fort Leavenworth, reserving the right expressly to serve civil or criminal process thereon and to tax private property therein. It was held that the railroad was liable to state taxation. The court said: "A state may for such purpose cede to the United States exclusive jurisdiction over a tract of land within its limits in a manner not provided for in the Constitution of the United States. If a state thus ceding to the United States exclusive jurisdiction over a tract within its limits reserves to itself the right to tax private property therein, and if the United States does not dissent, their acceptance of the grant, with the reservation, will be presumed."

If there is no reservation in the ceding act of the state, criminal acts committed within the boundaries of the post are triable only in United States courts, since the territory has become exclusively United States territory. After a state has parted with its political jurisdiction over a given tract of land, it cannot be said that acts done thereon are against the peace and dignity of the state or are violations of its laws. Black, Const. Law, p. 227.

In the case of Re Ladd, 74 Fed. 31, it was held that "while after an act of legislature ceding to the United States the jurisdiction of the state over a tract of land used as a military reservation, the municipal laws of the state, governing property and property rights, continue in force in the ceded territory except so far as in conflict with the laws and regulations of the United States applying thereto, the criminal laws of the state cease to be of force within the ceded territory. Hence laws regulating the sale of intoxicating liquors cease to be operative both as in conflict with the United States law, authorizing a canteen in the post, and as penal in character."

An interesting rule may be here noted, that if the United States has purchased real property in a state, and the state legislature has not recognized the presence of the sovereignty of the United States, then the latter is an ordinary proprietor and the land is state territory and hence as such is amenable to all state laws.

Exclusive Jurisdiction in Territories.

We have been examining heretofore the peculiar status of military officers and enlisted men in a locality within the state, exclusive jurisdiction over which has been vested in the United States. It is obvious that such a status cannot exist where the military post or reservation is situate in a territory, for a territory is not a sovereignty. (Talbott v. Silver Bow County, 139 U. S. 446, 35 L. ed. 212, 11 Sup. Ct. Rep. 594.) A territory is a political organization wholly dependent upon Congress and subject to its absolute supervision and control. (Church of Jesus Christ of L. D. S. v. United

States, 136 U. S. 43, 34 L. ed. 491, 10 Sup. Ct. Rep. 792.)

Winthrop, on page 1406, says that "as a general rule, in the absence of any provision in the organizing act or other United States statute exempting officers and soldiers from the jurisdiction of the authority of the local courts and officials (territorial) they will be amenable thereto in the same manner and to the same extent as are the civilian inhabitants, where such amenability may not interfere with the due performance of their military function."

A further result of this rule is that trial by a Federal civil court is a bar to trial by court-martial in so far as the military and civil courts have concurrent jurisdiction, as in larceny, for instance. But if a purely military offense is embraced by the criminal offense, a trial of the former may be had by the military court. For example, if an enlisted man strike an officer, he may be tried by a civil court for assault and battery and by a court-martial for the breach of military discipline, provided he was found guilty in the civil court. The contrary is true if he prove himself innocent in the civil court.

The service of process issuing out of the courts of the territories on a military reservation therein is restricted only by specific local or Federal laws, and by the requirement that the civil officer must apply to the commanding officer before attempting to serve his warrant or other writ. It may be observed here that the civil officer is holding under the authority of the United States in all cases, and is on the territory of that sovereignty when on a military reservation.

Commanding Officer Entitled to Services of Soldiers.

Municipal authorities have the right to arrest and imprison a soldier off the military reservation for breaches of the peace if such arrest and imprisonment do not deprive his commanding officer of his services. If such be the case, then the civil authority must release the soldier to the commanding officer, for he is entitled to the unqualified services of all the men in his command. In the noted case of Ex parte Schlaffer, 154 Fed. 921, a soldier was arrested and confined by the city police in the course of a raid upon the soldiers, planned by the police. An excessive fine was imposed by the city court, upon default in payment of which an alternative of a long term of imprisonment was given. The Federal court trying the appeal said:

"While an enlisted man in time of peace may be subjected to arrest and imprisonment for violation of a municipal ordinance the same as a civilian, yet where any punishment is sought to be inflicted which will interfere with the duties which he owes to the United States, the utmost good faith is required from civil authorities, and any unfair or unjust discrimination against the offender because he is a soldier, or departure from the strict requirements of the law, or any cruel or unusual punishment, may be inquired into by his commanding officer in proceedings in the Federal courts."

"The enlisted men are within the state and the city, not in accordance with their own will, but in accordance with the orders of their superior officers to whom they are answerable, and, although temporarily off duty for a short time, they are constantly subject to the terms of their enlistment and to the orders of their officers. Their position and the requirements of their constant duty demand in behalf of the national government from the municipal authorities such a recognition of its rights as would accomplish a preservation of the peace and the observance of the city ordinances as would in no way affect their duties as soldiers."

In that case the commanding officer was granted a writ of habeas corpus.

Civil Actions and the State Courts.

Thus far the discussion has been in reference to criminal acts as distinguished from civil actions. Now the latter is to be taken up and considered.

A civil action is one brought to recover some civil right or to obtain redress for some wrong not being a crime or misdemeanor. 1 Burrill's Law Dict. 294.

A civil action for redress for a wrong committed on a reservation may be tried by a state court as well as by a Federal

court, whether the right to serve civil process was reserved or not. If civil process may be served by the officers of the state court, jurisdiction of the subject-matter may be obtained by that court. The trial will proceed to judgment, execution on which may be by the service of civil process. On the other hand, if no reservation of the right to serve the civil process was made, or in case the reservation was purchased with the consent of the legislature of the state, the property or person of the defendant may be attached outside of the limits of the reservation. The trial then proceeds and the execution is asked for in a Federal court.

This paper will not attempt to discuss the liabilities of the commanding officer for such acts of his as give rise to a civil action in damages.

Rights of a Post Commander outside the Reservation.

Up to this time we have considered the rights and duties of a post commander on a reservation. Now we shall take up the subject of how far a post commander may invade the civil sphere to perform his duties while remaining within his rights, and to what extent he may rightfully demand the co-operation of the civil authorities. Any officer of the United States, either civil or military, may seize clothing, arms, military outfits, or accouterments found in the possession of any person not a soldier. (Rev. Stat. § 3748, Comp. Stat. 1913, § 6941.) No authority to enter and search a house for articles of government property may be implied from this section of the statutes. But the right to arrest a deserter includes the right to enter a house for that purpose. (Act of March 4, 1909.)

In the case of Private Rosenbeck, found in G. O. 29, Department of the Northwest, 1864, he, having been arrested by the civil authorities of the state of Wisconsin on a charge of murder, petitioned the department commander to be taken out of the custody of the civil authorities and to be tried by court-martial. To his petition, General Pope said: "The petitioner at the time the crime is charged to have been committed was on furlough and absent from his regiment, and was at the time acting in no sense in his military capacity. He was substantially in the same position before the law with any person not in the military service, and equally responsible to the civil authorities for any offense against the laws of Wisconsin. Petition denied."

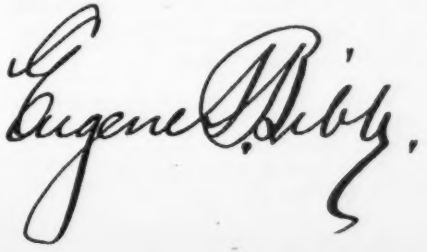
As to the definition of "furlough," Webster's Dictionary may be quoted: "A furlough is a leave or license given by a commanding officer to an officer or soldier to be absent from service for a certain time."

In case a soldier is held by state authorities, a court of the United States may, upon application of the United States, inquire into the cause of his detention by issuing a writ of habeas corpus. If, upon this inquiry, it is discovered that he is being confined for doing an act which was committed in the discharge of his duty as a soldier, the court has authority to determine summarily whether the charge upon which he is held is true or not. If not true, the court may discharge the prisoner. United States v. Lipsett, 156 Fed. 65.

Conclusion.

Every part of the United States is subject to the Constitution and Federal laws of the United States. State laws properly enacted are in force in the entire territory over which the state has jurisdiction. When the Federal and state laws conflict, the Federal law takes precedence and may be said to be the rule guiding the actions of all. Where military and civil law clash, the latter takes preference.

If a post commander acts under Federal law, he is secure, at all times and at all places in the United States, from interference by the state civil authorities. But if the Federal law be exceeded, the officer becomes liable to trial by the state court for violation of the state law.



Can the State of Wisconsin Constitutionally Engage in the Business of Life Insurance?

BY ALFRED JOSEPH BUSCHECK

of the Milwaukee Bar

ANTICIPATING the ratification of amendments to the state Constitution authorizing state insurance[1] the Wisconsin legislature of 1911 by statute provided for state life insurance. This statute authorizes the state to insure the lives of its residents to a certain amount without liability on its part beyond the amount of the fund accumulated from the premiums paid.[2] The duty of administering this fund is imposed upon the insurance commissioner, the governor, the secretary of state, the state treasurer, and the state board of health.[3] The constitutional amendments proposed by the same legislature, and approved by the legislature of 1913, but defeated when submitted to the vote of the people in the fall of 1914, follow:

"The state may grant annuities and insurance upon such risks and in such manner as may be prescribed by law, and the limitations and restrictions provided in the Constitution shall not apply to this subject; but provision shall be made for an annual accounting of all liabilities assumed, and the separation and safeguarding of all money and property held by the state on account of such insurance."

"The state may grant insurance upon such risks and in such manner as may be prescribed by law, and the limitations and restrictions provided in the Constitution shall not apply to this subject; but provision shall be made for an annual accounting of all liabilities assumed, and for the separation and safeguarding of all funds and property held by the state on account of any such insurance."

The system of state life insurance adopted by the Wisconsin legislature of 1911 has the advantage of not presenting many practical difficulties, and is therefore likely to be followed by other states which favor state life insurance. It is left entirely with the individual citizen whether he will insure in the "life fund," in a private company, or not carry insurance at all. At the same time the state as such assumes no liability.[4] Any other system, *e. g.*, compulsory state insurance, at the present time may still be considered out of the question in this country, because the people have not yet imbibed a sufficient quantity of the paternalistic ideals of Continental Europe.

However practical the system adopted may be, it presents certain constitutional difficulties. Although the fund is to be administered without liability on the part of the state, as a practical matter, the state participates to a considerable degree in this plan of insurance. In the first place, the office of the "life fund" is housed in the State Capitol. The "life fund" is not, and cannot legally be, charged with rent for the use of this office space. If a public function, it stands in the same position as the various officers, commissions, boards, etc., occupying the Capitol building, and of course ought not to be charged with rent. If not a public function, but a private enterprise, it may not be housed in a state building at all, even though it is charged with its appropriate share of rent. The state cannot constitutionally erect a building for the purpose of renting part of it for a private purpose.[5] In the next

[1] Rev. Stat. (Wis.) 1913, Proposed Amendments.

[2] Id. § 1989m1-18.

[3] Id. § 1989m1, 2, 3, 4, 7.

[4] Id. § 1989m1-18.

[5] Tyre v. Krug, 159 Wis. 39, 149 N. W. 718, L.R.A. 1915C, 624; Atty. Gen. v. Eau Claire, 37 Wis. 400; Opinion of Justices, 150 Mass. 592, 24 N. E. 1084, 8 L.R.A. 487; Opinion of Justices, 204 Mass. 607, 91 N. E. 405, 27 L.R.A. (N.S.) 483, and cases later cited and discussed.

place, it has been shown that certain duties are imposed on certain state officers in connection with the administration of the "state life fund." For the same reason, that if not a public function it may not be housed in a state building, state officers and employees paid with the proceeds of the state's revenues may not devote their time to the administration and work connected with this fund. In the third place, an expenditure of state funds was necessary, and, as a matter of fact, was made, to get the plan started. This is shown from the following quotation from the statute itself:

"Within two years after the taking effect of this section, the commissioner of insurance shall prepare and file in his office forms of applications and policies, schedules of premiums, tables of costs of insurance and reserve, and other data and forms for carrying out the provisions of this act." [6]

"Upon the filing of such forms, the commissioner of insurance shall furnish schedules of rates and copies of the forms of policies to every state factory inspector, to the clerk and treasurer of every county, town, city, and village, and to every state bank." [7]

It is obvious that it required both money and the time of a state official and state employees to carry out these provisions. When they were complied with, no premiums had yet been received. Obviously, state funds were used to meet the preliminary expenses provided for in these sections. Making the most favorable presumption in favor of the validity of this act, namely, that the amount taken for this purpose will be restored when the "life fund" is fully organized, which has not yet been done, it is clear that even then such a loan was in violation of the Constitution of this state, unless the organization and maintenance of a state insurance scheme constitute a public purpose. Article 8, § 3, of the state Constitution provides as follows: "The credit of the state shall never be given, or loaned, in aid of any individual, association, or corporation." It is clear that a loan for a private purpose as above indicated would be in violation of this section.

Enough has been said to show that the law providing for the establishment of the "state life fund" raises some important constitutional questions. The first question suggested is, Does state life insurance as worked out by the Wisconsin law constitute a public purpose? This involves two other questions. First, is it a governmental function, or, more particularly, does it constitute an exercise of the police power of the state? Second, although not justifiable as an exercise of the police power, can the state exercise its power of taxation for this purpose? Finally, will an amendment to the state Constitution overcome the difficulties presented?

Is state life insurance a governmental function? Can it be upheld as an exercise of the state's police power?

If state life insurance as it exists in Wisconsin is a governmental function at all, it seems clear that it must be one of those duties performed by the government in the exercise of its police power. It seems clear that it is not a public function in the sense that the building and maintenance of highways, bridges, and harbors, the establishment of parks, the operation of the postoffice, the lighting and policing of city streets, and other acts of this nature, are considered governmental functions. The justification for having the government perform these acts is a historical one. These and similar duties, both in this country and in England, have always been performed by the government. However, insurance has never been considered a public function in this sense.[8] In only one case has the question been raised whether it is a governmental function. In that case the question was whether insuring titles to land under the Torrens system of land registration constituted a governmental function. The court, in holding that it did not, used the following language:

"Considering the purpose for which government is instituted, and the high conception of individual right which prevailed at the time of the adoption of the Constitution, it would be strange if authority had been conferred upon the state to carry on the business of an insurer

[6] Rev. Stat. (Wis.) § 1989m3.
[7] Id. § 1989m6.

[8] Vance, Handbook on the Law of Insurance, chap. I.

of private titles. No such authority is implied in any of the terms of the Constitution. It is not implied in any of the enumerated purposes for which government is formed. It is entirely foreign to those purposes. The legislature may by law authorize the organization of corporations for the purpose of carrying on the business of insurance, but this grant of power is rather an implied negation of its authority to conduct such business itself.

"The functions of the state are governmental only. Its powers are embraced within the three familiar divisions of legislative, judicial, and executive. He who affirms the existence of the power in question must be able to find it embraced in one of these divisions. And since the insuring of titles does not essentially differ from any other insurance, nor indeed from any other business or occupation, he must find authority in whose exercise the state may become the competitor of the citizens in every vocation." [9]

If not a governmental function in the large sense of that term, can the Wisconsin law be upheld as an exercise of the state's police power? Many attempts have been made to define the police power. The following definition from a well-known case in which the question was involved will suffice for the purpose of this discussion:

"This power is, and must be from its very nature, incapable of any very exact definition. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." [10]

Probably some of the functions undertaken by the government, such as the ownership and operation of public utilities by municipalities, must find their ultimate justification in that they administer to the health, morals, comfort, and well-being of the entire people of a community. It is difficult to see how state life insurance can have any direct bearing on any of the aims enumerated in the above definition of police power. Neither is there any apparent similarity in their object between municipal ownership and operation of public utilities and state insurance. It might be urged that there is some connection between state life insurance and poverty, the alleviation of which is admittedly a proper exercise of the state's police power. It is clear, however, from the very nature of insurance, that its aim cannot be to aid the poverty stricken. Money in the "life fund" belongs to those insured, and cannot be taken to aid any person in need, irrespective of whether or not he contributed to the fund. The purpose of all insurance is to provide indemnity and protection to those who contract and pay therefor, and not to all who may find themselves in need thereof. Nevertheless, it may be argued that the purpose of state life insurance is to prevent poverty. This argument merits consideration.

As has been heretofore shown, the establishment and maintenance of the state "life fund" involves the expenditure of funds derived from taxation. It is by no means settled that the state may use public funds for the purpose of warding off poverty. There is a line of cases which hold it may not.[11] In Lowell v. Boston an act to loan the credit of the city of Boston to individual sufferers by the great fire, to enable them to rebuild each on his own property, was condemned. In State ex rel. Griffith v. Osawkee Twp. the court held unconstitutional an act of the legislature authorizing the issue of township bonds to provide means for furnishing destitute citizens with food and with seed. An opposite conclusion was arrived at on this question by the supreme court of North Dakota.[12] In Lucas County v. State, an act providing that a certain class of blind persons shall be paid $25 *per capita* quarterly, which was sought to be upheld on the ground that it would prevent these persons from becoming public charges,

[9] State ex rel. Monnett v. Guilbert, 56 Ohio St. 575, 60 Am. St. Rep. 756, 47 N. E. 551, 38 L.R.A. 519.

[10] Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394.

[11] Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; State ex rel. Griffith v. Osawkee Twp. 14 Kan. 418, 19 Am. Rep. 99; Lucas County v. State (Davies v. State) 75 Ohio St. 114, 78 N. E. 955, 7 L.R.A.(N.S.) 1196; Wisconsin Keeley Institute v. Milwaukee County, 95 Wis. 153, 60 Am. St. Rep. 105, 70 N. W. 68, 36 L.R.A. 55; State ex rel. Garrett v. Froehlich, 118 Wis. 129, 99 Am. St. Rep. 985, 94 N. W. 50, 61 L.R.A. 345; William Deering & Co. v. Peterson, 75 Minn. 118, 77 N. W. 568; Ives v. South Buffalo R. Co. 201 N. Y. 271, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517, 34 L.R.A.(N.S.) 162.

[12] State v. Nelson County, 1 N. D. 88, 26 Am. St. Rep. 609, 45 N. W. 33, 8 L.R.A. 283.

was held unconstitutional. In Wisconsin Keeley Institute v. Milwaukee County, and in State ex rel. Garrett v. Froehlich, the court held unconstitutional an act authorizing payments to private institutions for the treatment of habitual drunkards. However, on this same question a number of courts have arrived at an opposite conclusion.[13] In William Deering & Co. v. Peterson an appropriation for seed-grain loans to farmers whose crops had been destroyed was held unlawful, although the court intimated that an act limiting its benefits to those who are public charges, or those in imminent and immediate danger of becoming such, would be upheld. The case of Ives v. South Buffalo R. Co. will be discussed with the other cases directly involving the question of state insurance. On the other hand, several recent cases,[14] later discussed in detail, directly involving the question of state insurance, seem to hold that public funds may be expended for the purpose of forestalling poverty. Even conceding, however, what is by no means well established, namely, that the power of taxation may be resorted to for the purpose of aiding persons who without such aid would become public charges, that will not validate the Wisconsin act. Nowhere in the act do we find a clause limiting the benefits of the act to that class. On the contrary, it is apparent even from a casual reading of the act that insurance in the "life fund" is available to all residents of the state.[15] It does not compel the class in question to take out insurance, but leaves them to do as they please. It therefore leaves this class in precisely the same position that they were in before the passage of the act, except that it gives them, as all other residents of Wisconsin, an additional source from which life insurance may be obtained. If such additional source was really necessary, there are plenty of first-class life insurance companies only too eager to be licensed to write business in Wisconsin. The fact that the incidental result in a few cases may be to ward off poverty, and that there may be an incidental benefit to society from the establishment and maintenance of an additional source of cheap and safe insurance, is not sufficient to sustain the act.[16] This distinguishes the Wisconsin act from the Montana act, the constitutionality of which was *obiter* upheld in Cunningham v. Northwestern Improv. Co. 44 Mont. 180, 119 Pac. 554, 1 N. C. C. A. 720, and from the Washington act held constitutional in State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599, 37 L.R.A.(N.S.) 466. Both of these acts are limited in application to a class peculiarly likely to become poverty stricken because of the hazardous character of the wage earner's employment. The Ohio act, upheld in State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 97 N. E. 602, 1 N. C. C. A. 30, 39 L.R.A. (N.S.) 694, although of wider application, does not by any means make state insurance against accident, illness, and accidental death available to all the residents of the state, but limits it to a class. In this way it differs from the Wisconsin act. These cases will later be discussed in detail under a separate head. It will then be shown that in only one of them was it decided that public funds may be expended for the administration of a state insurance scheme.

It may, however, be argued with considerable plausibility that the state may sell life insurance as a means of regulating the business. Certainly a most effective way of controlling the business is to conduct it. Also, competition with state insurance may prove an effective method of regulation. There is no ques-

[13] Baltimore v. Keeley Institute, 81 Md. 106, 31 Atl. 437, 27 L.R.A. 646; Re House, 23 Colo. 87, 46 Pac. 117, 33 L.R.A. 832; and semble Webster v. Rapides Parish, 51 La. Ann. 1204, 25 So. 988.

[14] Cunningham v. Northwestern Improv. Co. 44 Mont. 180, 119 Pac. 554, 1 N. C. C. A. 720; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599, 37 L.R.A.(N.S.) 466; State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 97 N. E. 602, 1 N. C. C. A. 30, 39 L.R.A.(N.S.) 694.

[15] Rev. Stat. (Wis.) 1913, § 1989m.

[16] Opinion of Justices, 204 Mass. 607, 91 N. E. 405, 27 L.R.A.(N.S.) 483; Atty. Gen. v. Eau Claire, 37 Wis. 400; Beach v. Bradstreet, 85 Conn. 344, 82 Atl. 1030, Ann. Cas. 1913B, 946; cases above cited contra to state aid to prevent poverty.

tion as to the right of the state to regulate the business of insurance, even to the extent of fixing the rates of premium.[17] Can this power of regulation be carried so far as to assume the trusteeship of the "life fund," and pay out of the public funds the initiation and maintenance of such fund? Many private occupations, such as the construction of private dwellings along the streets of a city, the sale of illuminating oil,[18] the inspection of products offered for sale,[19] the exhibition of children below a certain age on the stage,[20] the plumbing trade,[21] bear such a relation to the public welfare that they may be regulated under the police power of the state. However, no one would urge that the state may construct private buildings, sell illuminating oil, exhibit children, or engage in raising them on a baby farm, or engage in the plumbing business. It may be urged that the insurance business is subject to a greater degree of regulation. Certainly the state's supervision over the insurance business is not broader than over banks and trust companies. Still it has never been held that the state may go into the banking business. As the right of the Federal government to conduct the Postal Saving Bank has never been passed upon, the mere fact that it does so is no argument in favor of the validity of state insurance. Both may be open to the same constitutional objections.

Finally, the position may be taken that, inasmuch as it has been decided by the United States Supreme Court that the public interest is involved in the insurance business to such a degree as to justify state rate making, that this puts insurance in the same class with those activities, such as public utilities,[22] which may be either owned and operated by the government, or left to private initiative subject to a large degree of governmental regulation, including the regulation of rates. Probably the Federal government may also own and operate interstate railroads, telegraph, and telephone lines. From this it does not necessarily follow that the state may engage in the business of insurance. The right to regulate in the instances above enumerated grows out of the right of the state to perform the function itself. The right to regulate insurance companies grows out of the public interest involved. This is made clear by other instances in which state regulation of rates was upheld. We are told that "it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold." That "to this day, statutes are to be found in many of the states upon some or all of these subjects.[23] A curious instance of this is a case in Louisiana[24] in which the regulation by the state of the price of bread was upheld. Again government regulation of charges for the use of stockyards,[25] and for grain elevator service,[26] have been upheld because of the public inter-

[17] German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, 34 Sup. Ct. Rep. 612, L.R.A. 1915C, 1189.

[18] United States v. Dewitt, 9 Wall. 41, 19 L. ed. 593.

[19] Com. v. Carter, 132 Mass. 12.

[20] People v. Ewer, 141 N. Y. 129, 38 Am. St. Rep. 788, 36 N. E. 4, 25 L.R.A. 794.

[21] Singer v. Maryland, 72 Md. 464, 19 Atl. 1044, 8 L.R.A. 551.

[22] The right of the state or city to own and operate public utilities is recognized in many cases, e. g., Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224; Vicksburg v. Vicksburg Water Works Co. 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253; Jopplin v. Southwest Missouri Light Co. 191 U. S. 150, 48 L. ed. 127, 24 Sup. Ct. Rep. 43; Helena Waterworks Co. v. Helena, 195 U. S. 383, 49 L. ed. 245, 25 Sup. Ct. Rep. 40; Atty. Gen. v. Eau Claire, 37 Wis. 400; State v. Eau Claire, 40 Wis. 533; Wisconsin Water Co. v. Winans, 85 Wis. 26, 41, 39 Am. St. Rep. 813, 54 N. W. 1003, 20 L.R.A. 662.

[23] Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468.

[24] Guillotte v. New Orleans, 12 La. Ann. 432.

[25] Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; Budd v. New York, supra.

[26] Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30.

est involved. In none of these cases and at no time has it been contended that the state could constitutionally engage in these occupations because it has the undoubted right to fix the rate of charges. Thirty-eight years have not yet elapsed since Chief Justice Waite of the United States Supreme Court extracted the doctrine that "when . . . one devotes his property to a use in which the public has an interest, he . . . must submit to be controlled by the public for the common good"[27] from an old English law treatise and some old English cases [28] and applied it to grain elevators. Still in all this time it has never been sought to be applied, except in one instance, in such a way as to authorize the government to engage in this occupation. In that case the court held that the right to regulate a business in its most minute detail, including the fixing of rates of charge, did not carry with it the right to engage in that business. In that case the legislature of Minnesota had provided for the erection and operation of a grain elevator by the state. The following quotation from the opinion of that case is pertinent in this connection:

"The position of defendant's counsel really amounts to this: that whenever those who are engaged in any business which is affected with a public interest, and hence the subject of government regulation, do not furnish the public proper and reasonable service, the state may, as a means of regulating the business, itself engage in it, and furnish the public better service at reasonable rates, or, by means of such state competition, compel others to do so. The very statement of the proposition is sufficient to show to what startling results it necessarily leads. . . . The police power of the state to regulate a business does not include the power to engage in carrying it on." [29]

From what has been said it seems clear, first, that even conceding the state may spend public funds to anticipate poverty, which is exceedingly doubtful, the Wisconsin law creating the "life fund" cannot be upheld on this ground, because it has no direct tendency to bring about such a result. Second, that although insurance is subject to the most minute regulation at the hands of the state, including the fixing of the rates of premium, this power of regulation may not be exercised by going into the insurance business. The result of these two propositions is that the Wisconsin act creating the "state life fund" cannot be upheld as an exercise of the police power of the state. Consequently the expenditure of public funds for the purpose of carrying into effect this law cannot be justified as in aid of the police power of the state. It remains to be shown that the expenditure of public funds in aid of private individuals, and not in the exercise of the state's police power, is illegal.

The expenditure of public funds in aid of private individuals, and not in the exercise of the state's police power, is illegal.

It is elementary and too well settled in this state and elsewhere to require a citation of the numerous authorities to that effect, that the state's power of taxation may be exercised only for a public purpose, and that the proceeds of taxation may not be devoted to a private use. It is equally clear that "a legislature which has no power to authorize the levy of a tax . . . for a private purpose, has no power to draw that authority to itself, or to create it by its mere declaration that a private purpose is a public one. . . . A legislature cannot make a private purpose a public one by its mere fiat."[30] Does state insurance as provided for by the Wisconsin act in question constitute a public purpose? The test for determining this question is indicated in several well-known cases.[31] To quote from one:

"It (the term public purpose) is . . . merely a term of classification, to distinguish the object for which, according to settled usage, the government is to provide, from those which,

[27] Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

[28] Hale, Sir Matthew, De Portibus Maris, 1 Hargrave's Law Tracts, 78; Bolt v. Stennett, 8 T. R. 606, 5 Revised Rep. 486; Allnutt v. Inglis, 12 East, 527, 11 Revised Rep. 482.

[29] Rippe v. Becker, 56 Minn. 100, 57 N. W. 331, 22 L.R.A. 857.

[30] Dodge v. Mission Twp. 54 L.R.A. 242, 46 C. C. A. 661, 107 Fed. 827.

[31] People ex rel. Detroit & H. R. Co. v. Salem Twp. 20 Mich. 452, 4 Am. Rep. 400; Citizens Sav. & L. Asso. v. Topeka, 20 Wall. 655, 665, 22 L. ed. 455, 461.

by like usage, are left to private inclination, interest, or liberality." [32]

Neither in this country nor in England has life insurance ever been considered a public purpose entitled to be aided by taxation.[33] No case is on record in which insurance was held to constitute a public purpose and consequently entitled to be aided by taxation, except those few recent ones later discussed, in which the expenditure of public funds was justified as in aid of the police power. It seems clear, therefore, that state insurance does not come within the test above laid down.

State insurance has been shown not to be an exercise of a governmental function. Likewise, it has been shown that the Wisconsin statute establishing the "life fund" cannot be upheld as an exercise of the state's police power. Furthermore, as shown above, it has never been held to constitute a public purpose in the aid of which the expenditure of public funds is permissible. It follows that it is a scheme for extending governmental aid to certain individuals, a device for taxing the great mass of people for the benefit of a select few, a contrivance for taking money out of the pocket of one citizen and putting it into the pocket of another, justified probably on the ground that it is in furtherance of some vague, illusive, socialistic, and communistic ideal of social justice. That this is its purpose can be gathered from the following statement of an advocate of compulsory state insurance:

"Another advantage to be gained from governmental insurance may lie in the fact that the government can make use of its taxing and of its governing power to carry it through. In other words, it need not conduct the business on actuarial principles exclusively. It can give certain classes benefits out of proportion to the premiums which they pay. In other words, it can combine the quasi-tax of the insurance company with the real tax imposed by sovereignty. If it decides to do this, it is not guided by merely commercial considerations. It hopes to influence the distribution of wealth." [34]

It is settled beyond all question that aid to individuals except in the exercise of the state's police power or in the exercise of a governmental function, even though the community may indirectly and incidentally be benefited by such aid, does not constitute a public purpose.[35] Quotations from a few of the cases cited are in point.

"The power to levy taxes is founded on the right, duty, and responsibility to maintain and administer all the governmental functions of the state, and to provide for the public welfare. To justify an exercise of the power requires that the expenditure which it is intended to meet shall be for some public purpose, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect to property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the state, which results from the promotion of private interests, and the prosperity of private enterprises and business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, and justify a tax, and not the magnitude of the interest to be affected, nor the degree to which the general

[32] People ex rel. Detroit & H. R. Co. v. Salem Twp. supra.

[33] Vance, Handbook on the Law of Insurance, chapter I.

[34] Farnam, Henry W., Governmental Insurance, in Yale Insurance Lectures, vol II. page 285.

[35] Beach v. Bradstreet, 85 Conn. 344, 82 Atl. 1030, Ann. Cas. 1913B, 946; Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; State ex rel. Griffith v. Osawkee Twp. 14 Kan. 418, 19 Am. Rep. 99; Lucas County v. State (Davies v. State) 75 Ohio St. 114, 78 N. E. 955, 7 L.R.A. (N.S.) 1196; William Deering & Co. v. Peterson, 75 Minn. 118, 77 N. W. 568; State ex rel. Garth v. Switzler, 143 Mo. 287, 65 Am. St. Rep. 653, 45 S. W. 245, 40 L.R.A. 280; Deal v. Mississippi County, 107 Mo. 464, 18 S. W. 24, 14 L.R.A. 622; Atty. Gen. v. Eau Claire, 37 Wis. 400; Curtis v. Whipple, 24 Wis. 350, 1 Am. Rep. 187; Jenkins v. Andover, 103 Mass. 94; Weismer v. Douglas, 64 N. Y. 91, 21 Am. Rep. 586; Opinion of Justices, 204 Mass. 607, 91 N. E. 405, 27 L.R.A.(N.S.) 483; Re Eureka Basin, Warehouse & Mfg. Co. 96 N. Y. 42, 48, 49; Turner v. Althaus, 6 Neb. 54, 71; Good v. Zercher, 12 Ohio, 367; Norman v. Heist, 5 Watts & S. 171, 40 Am. Dec. 493; Denny v. Mattoon, 2 Allen, 361, 79 Am. Dec. 784; Greenough v. Greenough, 11 Pa. 494, 51 Am. Dec. 567; Shawnee County v. Carter, 2 Kan. 131; Holden v. James, 11 Mass. 396, 6 Am. Dec. 174.

advantage of the community, and thus the public welfare, will be ultimately benefited by their promotion."[36]

Equally if not more pertinent, especially in view of the fact that the state which created the "life fund" has also sought to extend the term "public purpose" in many other directions, is a quotation from a brief of a former chief justice of the Wisconsin supreme court, L. S. Dixon, filed in the case of Atty. Gen. v. Eau Claire,[37] and printed in full in the reports:

"The revenues of the state are a portion that each subject gives of his property in order to secure or to have the agreeable enjoyment of the remainder. To fix these revenues in a proper manner, regard should be had to the necessities of the state, and those of the subject. The real wants of the people ought never to give way to the imaginary wants of the state.

"Imaginary wants are those which flow from the passions and weakness of governors, from the charms of an extraordinary prospect, and from the distempered desire of vainglory, and from a certain impotency of mind, rendering it incapable of withstanding the attacks of fancy. Often has it happened that ministers of a restless disposition have imagined that the wants of their own little and ignoble souls were those of the state. Montesquieu, Spirit of Laws, Book XIII. chap. I.

"Here, where all citizens are, in a certain sense 'governors' and 'ministers,' as well as 'subjects,' and projects of legislation looking mainly for private gain and emolument, though well cloaked under specious pretenses of regard for the public weal, are as numerous as the locusts in Egypt, these suggestions of the wisdom and prudence of our old days ought to be carefully regarded; and it is especially becoming to our legislators to be cautious not to overstep the constitutional boundaries of their authority, nor to inaugurate a system of legislation the manifest aim and end of which is to enhance private gain at the public expense. Opinion of Justices, 58 Me. 608-609."

Apparently contra to the principle stated, and in support of which the foregoing remarks were quoted, are State ex rel. New Richmond v. Davidson,[38] and State v. Nelson County.[39] In the first of these it was held that the legislature might lawfully appropriate the public money to pay a debt incurred by a municipality which was stricken by a cyclone, for burying its dead, removing *débris*, and caring for the injured and homeless. In the other case, an act authorizing counties to issue bonds to procure seed grain for needy farmers who might be unable to procure the same was held valid as authorizing taxation for a public purpose. It is submitted that both of these cases can be supported under a liberal definition of the police power, which finds further support in the state insurance cases hereafter discussed, and that they do not militate against the general principle above stated. It follows that the use of public funds for the initiation and promotion of the Wisconsin "life fund" is unconstitutional.

Cases involving the question of state insurance.

Several decisions handed down within the last three or four years directly involve the question of state insurance. It is proposed now to examine these in some detail. In 1909 the legislature of Montana passed an act which provided that each coal-mine operator should make certain monthly payments to the state auditor. Part of these payments was to come out of the wages of employees, withheld from them, and part from the operators. These payments were to be used to constitute a fund out of which employees were to be compensated for injury and total disability, and their dependents for their death. Employees resorting to an action at law were to lose their right to compensation. Certain duties were imposed by this act upon the state auditor, the state treasurer, and the state board of health, in connection with the administration of the fund thus created. An action was brought by the state auditor against a corporation within the purview of this act for the payments provided for. The court sought to justify the act as a proper exercise of the police power, but finally held it unconstitutional because it did not abolish actions at law for injuries or death, and as a result, employers, after full compliance with the act, were still subject to be sued and compelled to pay damages. This was

[36] Lowell v. Boston, 111 Mass. 454, 461, 15 Am. Rep. 39.
[37] 37 Wis. 400.
[38] 114 Wis. 563, 88 N. W. 596, 90 N. W. 1067, 58 L.R.A. 739.
[39] 1 N. D. 88, 26 Am. St. Rep. 609, 45 N. W. 33, 8 L.R.A. 283.

held to deprive employers of the equal protection of law.[40]

It is to be noted, first, that everything said by the court as to the constitutionality of the act as a proper exercise of the police power is *dicta*, pure and simple, as it was necessary to declare the act unconstitutional on another ground. In the second place, the argument seeking to uphold the act as a proper exercise of the police power was based on a statement in the opinion of Noble State Bank v. Haskell, [41] to the effect that the police power "may be put forth in aid of what is held by the prevailing morality or strong and predominant opinion to be greatly and immediately necessary to the public welfare." This novel reason loses much of its force because the decision in Noble State Bank v. Haskell was based also on other reasons better sanctioned by authority. In the third place, even conceding, for the sake of argument, that the act can be upheld as a proper exercise of the police power, it has been shown that because the Wisconsin act is general in its application, and not limited to a particular class engaged in an extra-hazardous occupation, as the Montana act undoubtedly is, it cannot be so upheld. Finally, the question whether or not the people generally may be taxed for the administration of such a fund was not raised and not discussed or passed upon.

The Montana act was very similar to the Washington act dealing with the same subject, and which had been held constitutional [42] when the constitutionality of the Montana act was raised. In the case upholding the constitutionality of the Washington act, it was decided, although that point was not discussed by the court except in the dissenting opinion, and apparently not argued, that the state auditor could be compelled by mandamus to pay for furniture provided for the "Industrial Insurance Department," which was to administer the fund. An appropriation had been made for the salaries and expenses of this department. The opinion itself is devoted to upholding the act as an exercise of the police power. It should be noted in connection with this case, first, that as the point was not argued or discussed by the court, this case is only a very weak authority for the proposition that public money may be used for the administration of a state insurance scheme. Second, this act confines its benefits to a particular class, and is therefore different from the Wisconsin statute, which is general in its application.

The Ohio act, also involving the subject of workmen's compensation by means of a state fund, was upheld in State ex rel. Yaple v. Creamer.[43] Although including all employers of five or more employees, it was upheld as a proper exercise of the police power. Consequently it was decided that public money may be used in Ohio for the administration of a state insurance scheme. The only difference between the Ohio act and the Wisconsin act is that the former is less general in its nature. Probably in these days of rapid changes and of an ever increasing sense of social responsibility, all employees may be considered more or less likely to become poverty stricken, and hence proper subjects for protection under the paternalistic wing of the state. It must have been on some such altruistic or exaggerated humane theory of the duty of the state as this that the Ohio act was upheld.

We come now to a group of cases which, if not carefully studied to determine exactly what is decided, may cause considerable difficulty. These opinions, when read in connection with the opinions of the lower Federal courts, of the state supreme courts which passed upon the question, and the opinion on the petition for a rehearing, present no real difficulty. Although Justice Holmes used some unusually radical language as to the scope of the police power in the

[40] Cunningham v. Northwestern Improv. Co. 44 Mont. 180, 119 Pac. 554, 1 N. C. C. A. 720.

[41] 219 U. S. 104, 55 L. ed. 112, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487, 32 L.R.A. (N.S.) 1062.

[42] State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599, 37 L.R.A.(N.S.) 466.

[43] 85 Ohio St. 349, 97 N. E. 602, 1 N. C. C. A. 30, 39 L.R.A.(N.S.) 694. This case was decided before the Ohio Constitution was amended so as to provide for the enactment of a compulsory compensation act including the state insurance feature.

course of his opinions, the sum and substance of all these cases seems to be that the state may compel all state banks to contribute to a guaranty fund to be used for the purpose of protecting depositors against insolvency of these banks.[44] This seems to have the sanction of usage, and is probably a proper exercise of the police power, as it tends to prevent poverty through bank failures and to promote the currency of checks. If the banks be regarded as the insured, the benefits conferred and the liabilities imposed by the act are limited to a particular class, and it is not, like the Wisconsin act, general in application. In these cases, also, the question whether the people of the state may be taxed for the administration of this fund, although raised in one of the lower courts, was not decided on appeal. It seems, therefore, that of the cases above discussed, only one[45] decided, after a consideration of the question, that the proceeds of taxation may be applied to the administration of a state insurance scheme. Furthermore, this holding is conditioned upon the fact that the state insurance scheme is in the exercise of the police power of the state. Certainly taxation for the purpose of administering the Wisconsin "life fund," which has been shown not to be an exercise of the police power, finds no support in this case.

A New York state insurance scheme passed in connection with a workmen's compensation act was held unconstitutional because depriving the employer of his property without due process, and because it was not in the exercise of the police power of the state.[46] The following quotation from the opinion of that case is pertinent in this connection:

"If the argument in support of this statute is sound we do not see why it cannot logically be carried much further. Poverty and misfortune from every cause are detrimental to the state. It would probably conduce to the welfare of all concerned if there could be a more equal distribution of wealth. Many persons have much more property than they can use to advantage, and many find it impossible to get the means for a comfortable existence. If the legislature can say to an employer, 'You must compensate your employee for an injury not caused by you or by your fault,' why cannot it go further and say to the man of wealth, 'You have more property than you need, and your neighbor is so poor that he can barely subsist; in the interest of natural justice you must divide with your neighbor so that he and his dependents shall not become charges upon the state.'"

As already shown,[47] the same court which decided State ex rel. Yaple v. Creamer[48] had held in an earlier case[49] that state insurance is not a governmental function. This same court also had held unconstitutional a governmental insurance scheme providing for compulsory contributions to a teacher's pension fund.[50]

From what has gone before, it follows that the few cases directly involving the question of state insurance in some form or another, and the still fewer number in which it has been upheld, do not tend to support the constitutionality of the law creating the Wisconsin "life fund." Even conceding that one, or probably two, of the cases uphold the right to tax for the purpose of paying the expense of administering a state insurance fund, still, it is clearly established that this can be done only as supplementary to the exercise of the police power, *i. e.* only after a public purpose has been established. But it has been heretofore shown that the initiation and maintenance of the Wisconsin "life fund" is not a legitimate exercise of the police power. Also, there is in all the cases which sanction state insurance a reference to the legal obligation of the insured to the beneficiary; an obligation established by the law in

[44] Noble State Bank v. Haskell, 219 U. S. 104, 575, 55 L. ed. 112, 341, 31 Sup. Ct. Rep. 186 and 299, Ann. Cas. 1912A, 487, 31 L.R.A. (N.S.) 1062, 1065; Shallenberger v. First State Bank, 219 U. S. 114, 55 L. ed. 117, 31 Sup. Ct. Rep. 189; Assaria State Bank v. Dolley, 219 U. S. 121, 55 L. ed. 123, 31 Sup. Ct. Rep. 189.

[45] State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 97 N. E. 602, 1 N. C. C. A. 30, 39 L.R.A.(N.S.) 694.

[46] Ives v. South Buffalo Ry. Co. 201 N. Y. 271, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517, 34 L.R.A.(N.S.) 162.

[47] Pages 5 and 6.

[48] 85 Ohio St. 349, 97 N. E. 602, 1 N. C. C. A. 30, 39 L.R.A. (N.S.) 694.

[49] State ex rel. Monnett v. Guilbert, 56 Ohio St. 575, 60 Am. St. Rep. 756, 47 N. E. 551, 38 L.R.A. 519.

[50] State ex rel. Ward v. Hubbard, 22 Ohio C. C. 252, affirmed in 65 Ohio St. 574, 64 N. E. 109, 58 L.R.A. 654.

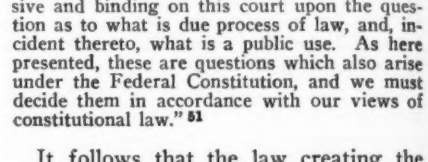
the interest of the community. Such an obligation does not exist in the case of an ordinary life insurance contract, such as is issued by the Wisconsin "life fund." It follows that the Wisconsin act in question, which has been shown to be unconstitutional in principle, has no decided cases to rely upon.

Will an amendment to the state Constitution authorizing state insurance meet the difficulties presented?

It has been established that state insurance as it exists in Wisconsin to-day is in conflict with all well-established principles of constitutional law, and has no authority in its support. It remains for us briefly to consider whether a constitutional amendment authorizing state insurance, similar to those quoted at the beginning of this article, will meet the difficulties presented. It has heretofore been shown that the establishment and maintenance of the "life fund" involves taxation for a private purpose. It is too well settled to require a citation of cases, that taking by taxation for a private purpose is forbidden by the due process clause of the 14th Amendment. The Federal Supreme Court is not bound by a declaration in the State Constitution as to what consitutes a public purpose, as is shown by the following quotation:

> "We do not assume that these various statements, constitutional and legislative, together with the decision of the state court, are conclusive and binding on this court upon the question as to what is due process of law, and, incident thereto, what is a public use. As here presented, these are questions which also arise under the Federal Constitution, and we must decide them in accordance with our views of constitutional law." [51]

It follows that the law creating the Wisconsin "life fund," which is unconstitutional because it involves the expenditure of public funds for a private purpose, cannot be brought within constitutional limitations by an amendment to the state constitution.[52]



Note. Since writing this article, in December, 1914, the case of Jensen v. Southern P. Co. [215 N. Y. 514, 109 N. E. 600, 9 N. C. C. A. 286, L.R.A. 1916A, 403] referred to by Miles M. Dawson in his article in the September number of CASE AND COMMENT, has come to the writer's attention. He fails to see the basis of the distinction sought to be made by the distinguished New York court of appeals, and suspects that the reasoning in this case is a subterfuge of the court to terminate the popular criticism occasioned by the case of Ives v. South Buffalo R. Co. supra.

[51] Falbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

[52] The only question decided by the United States Supreme Court in Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570, was that limiting the application of the Ohio Compulsory Workmen's Compensation Act to shops with five or more employees did not result in arbitrary or unreasonable classification. This case, therefore, does not affect the conclusion above stated.

Reason the Basis of Law

Law in the last analysis is reason applied to the conditions of life. Unless it be that it does not deserve to be called law.

A legal decision which cannot be submitted to scrutiny and discussion does not deserve respect.

All that is arbitrary, that is not based on reason, on expediency and service to the people, for whom the law acts, should be put aside.—R. F. Lozier.

The Far Eastern American Bar Association

ADDRESS OF EX-GOVERNOR WALSH

THE luncheon given by the Shanghai members of the Far Eastern American Bar Association in honor of Ex-Governor David I. Walsh, of Massachusetts, at the Astor House on May 2, was a success in every respect. With the exception of one member who was ill and two others who were absent from the city, every local member of the association was present.

After a substantial menu, to which all did full justice, the president, Judge Lobingier, introduced the guest of honor, remarking that one of the objects of the association was to keep in touch with the profession in the homeland by meeting and hearing distinguished representatives thereof who should come to the Far East. The danger of losing professional connections with the home country was great, and opportunities of overcoming it were to be welcomed. He felt sure that the guest of the day had a message which the members would all want to hear.

Governor Walsh was received with a hearty round of applause, and began by saying that his experience at the bar had been an active and a busy one. He had commenced practice at Fitchburg, Massachusetts, where his older brother, since deceased, had begun his professional career some ten years earlier. Succeeding to his brother's practice, and profiting by an enviable reputation which the latter had acquired, the future governor soon found himself continuously engaged in the courts, and it was from his experience there, and not from theories, that he would speak.

Coming to the heart of his theme, which was "New Ideals of the Legal Profession in America," the governor said that the lawyer was an employee, and like any other, must put himself in the employer's place if he would attain the highest success. This meant that the lawyer must come out of himself, must get the other man's viewpoint, and cease to be self-centered. The greatest lawyers were those who served not only their clients, but also the public and society, and to this tendency was due much of what had been accomplished toward humanizing the law.

As an instance of this process he mentioned the workingmen's compensation act, which was now in force in most of the states, and which did away with the monstrous doctrine that a day laborer might be maimed for life, forfeit all compensation, and become an object of charity if he happened to be classed as a "fellow servant." The relief of this situation was not, however, accomplished at once. When the governor assumed his office, Massachusetts had already enacted a so-called "compensation act," but the figures disclosed that the insurance companies, and not the workmen, were reaping the lion's share of the benefit; for out of every dollar paid up to that time the workmen received less than one third. The governor succeeded in securing the adoption of amendments to the law, so that now they were receiving more than two thirds.

The need of altruism on the part of the legal profession existed not alone in the bar, but in the bench as well. Too often judges had been drawn from the aristocratic ranks of society with no real knowledge of the condition of its less fortunate members. This tended to make the bench unsympathetic, exclusive, and not infrequently led to judicial tyranny. The governor spoke of overbearing treatment which used to be meted out to

lawyers and litigants by such judges who, fortunately, were much less numerous in America than formerly. The judge of the new order recognizes the lawyer as a fellow officer of the court, and not as an underling; and the speaker was greatly pleased to note that in the association which he was addressing the bench and the bar were working harmoniously together.

The Ex-governor is well acquainted with Louis D. Brandeis, the new associate justice of the Federal Supreme Court. Mr. Brandeis, the speaker said, is an able, fearless, independent man, who well deserves the title of "the people's lawyer." Of humble origin, his career has been self-made, and he knows and sympathizes with the masses from whom he sprung. Before he was twenty-one years of age he was writing articles for the Harvard Law Review, one of the foremost legal publications in the country. He has attained great success at the bar, and amassed considerable wealth, notwithstanding which he lives very simply and gives liberally of his means to the furtherance of needed reforms, having paid $15,000 out of his own pocket toward securing state insurance for Massachusetts, which was largely brought about through his efforts. Mr. Brandeis practices Emerson's rule of "plain living and high thinking," and will be a real addition to the Supreme Court.

Governor Walsh was loudly applauded and individually congratulated at the close of his address, and received a vote of thanks from the association. A short business session was then held, and Frank W. Hadley, Esquire, was elected to membership, after which the meeting adjourned subject to the call of the president.

A Test Case

When the jury's idly staring,
And you know the court's no friend;
When the other side is glaring,
And you wish the thing would end,
It isn't hard to smile.

When a doubting client's talking,
And he hints of crooked games;
Or some caller's simply shocking
With the way he calls you names,
It isn't hard to smile.

When you have for days been working
On a most illusive thing,
And some one suggests you're shirking,
And of course you feel the sting,
It isn't hard to smile.

When that combination locking,
On the drawers in your desk,
Fails to open and keeps balking
In a fashion picturesque,—
How about the smile?

W. J. Aiken.

A Kentucky Case

BY BAZIL PRATHER

WELL, I am studying your case, Mr. Hoovey," said Mr. Smalkins, the young lawyer, trying to ignore the fact that his aged farmer client, Mr. Gainey Hoover, was more than usually under the influence of Kentucky's famous corn product.

"That's right!" almost shouted Mr. Hoovey, who had come stooping in, brushing his long white hair from his wrinkled red face. "I want ter win that suit."

His tone was entirely too loud for the convenience of an old lawyer, the senior associate of Mr. Smalkins, who was talking with two clients at the other end of the long room.

"Not so loud, Mr. Hoovey;" Mr. Smalkins turned his head aside from a hot blast of bourbon-laden breath from the excited Mr. Hoovey, who was drawing nearer to him.

"Don't let me lose this case," said Mr. Hoovey, growing pathetic. "Don't let them turn the old man out in the world to die!"

"All right," said Mr. Smalkins. Mr. Hoovey came closer.

"No, don't let me lose it, my boy." By this time Mr. Hoovey had his arm around the neck of the struggling Mr. Smalkins, whose face was even redder than his client's, and who was keenly aware that the old lawyer and the others were making no effort to restrain their laughter.

Mr. Smalkins hastily disengaged the arms of Mr. Hoovey and assured him of his best efforts in the case. He even accomplished quite a successful laugh, shook hands with Mr. Hoovey, who was going, and who went stooping out of the door with tears streaming from his eyes.

The following Saturday, the farmer, fairly sober, came again. No one was in the office but his faithful lawyer. The old man was surprisingly sensible and reasonable—seemed to be keyed up just to the right pitch, and the two went over the case together.

"Mr. Hoovey," said Mr. Smalkins after a time, rather uncertainly, "I want to say something to you, but I hesitate to say it. One reason is that I am a very young man."

"Go ahead," said Mr. Hoovey.

"Well," continued his counsel, blushing, "I want you to come to court next Wednesday perfectly sober, without having taken a drop."

"I'm pretty feeble without a drop," Mr. Hoovey smiled. "Don't you think I'd better have a dram or two ahead?" Mr. Smalkins remembered the affectionate scene of the preceding Saturday, and shook his head. "Not a drop," he said, "not one."

"Very well," Mr. Hoovey promised, "until I'm through with testifying I won't take a dram, but afterwards—my land!"

"No, no," laughed Mr. Smalkins, "give it up altogether."

"I'll talk that over with you after we win the case." Mr. Hoovey screwed up his face with a smile.

Wednesday came, and Mr. Hoovey, perfectly sober and very feeble, accompanied by his lawyer, slowly mounted to the court room. The white-haired judge with the round rosy face was in a bad humor. He snapped at the lawyers. Jurors asking to be excused were summarily told to serve their country. But when he espied Mr. Gainey Hoovey, a change took place in his countenance. He bowed to the old farmer with a smile, recognizing one of his political supporters of many years standing. He called the case of "Gainey Hoovey against Casper Immerhorn; Mr. Smalkins for the plaintiff and Mr. Snatcher for the defendant. Is the plaintiff ready?"

The young lawyer turned to Mr. Hoovey, who feebly bowed his head.

Mr. Smalkins then stood up blushing and said timidly, "Ready."

The judge, leaning forward, put his hand behind his ear.

"A little louder, Brother Smalkins. You have naturally a very fine voice, but it is smothered by your heavy moustaches."

"Brother Smalkins" turned crimson even to the down upon his upper lip, and shouted, "Ready!" while the judge's gavel beat down the laughter from the crowded court room.

"Very well," said the old judge with a sly smile. "Mr. Sheriff, hand the lists of the jurors to learned counsel."

Mr. Hoovey, almost too feeble to sit up, was of no assistance to his lawyer in selecting a jury.

"I've got nothin' agin a one of 'em," said he.

Mr. Smalkins crossed out three of the youngest looking jurors in the list of eighteen; while Mr. Snatcher, for the defense, crossed out the names of three old men. The twelve thus selected were sworn.

Mr. Smalkins, addressing the jury, explained in opening that the suit was about the disputed ownership of a certain 29 acres of land. His client, Mr. Hoovey, had occupied and claimed a larger tract of 300 acres, which embraced it, in adverse possession for more than thirty years. Nearly all the time the whole tract had been inclosed by a fence. Therefore his title was perfect, notwithstanding the fact that his deeds were somewhat defective. Yet in spite of his possession, the defendant, Immerhorn, the neighboring milkman, had coolly cut off the tract of 29 acres by a fence and begun to build a cow stable upon the lot. A bitter quarrel had followed, enlivened by sticks and even shots. The dispute had been brought into court for settlement.

Mr. Snatcher, for the defense, arose, and in his statement claimed ownership under perfect deeds from the same grantor of an older date, and denied the claim of adverse possession relied on by the plaintiff. "The plaintiff is a shrewd old man, gentlemen of the jury," he added, "but he forgets a good many things. He takes something that makes him forget."

The court rapped sternly for order. "Let us be parliamentary, Mr. Snatcher."

"That is all I have to say in opening." Mr. Snatcher sat down, leaving an implication that what he could say in closing would bring down the courthouse.

Numerous witnesses stood up, and, holding up their toil-hardened hands, were sworn.

Mr. Hoovey took the stand. He was so faint that he could hardly speak. Deeply Mr. Smalkins regretted his stern enforcement of total abstinence, for his old client sat crumpled up in the witness chair, his face a pallid brown-white hue almost as colorless as the white hair which hung about his neck.

"Speak louder," he called to Mr. Hoovey.

Mr. Hoovey tried, but only feeble little sounds came from his throat.

The old judge listened respectfully saying sometimes in a polite manner "Louder,—a little louder,—Mr. Hoovey."

The sheriff handed him a glass of water.

A gleam of intelligence came into Mr. Hoovey's dull blue eyes.

"Kin I have a chaw of tobacker, Judge?" he asked.

"Certainly," said his honor.

He refreshed himself in this manner, and politely offered a large chunk to the jury, with an innocent and childlike air of good faith, at which Mr. Snatcher snorted.

"I take an exception."

"Give Mr. Snatcher an exception, Mr. Clerk," said the Judge. The clerk scratched with his pen. An old juror on one end looked up expectantly at the clerk, but nothing further came of it.

Mr. Hoovey raised himself in his witness chair, which was not far from the jury, and, stretching out an exceedingly long arm, offered the chewing tobacco to Mr. Snatcher himself. He indignantly refused it, at which Mr. Smalkins bent down over his table and laughed uncontrollably. The court room caught the contagion; a convulsion of free-hearted laughter shook the window while the

sheriff beat and pounded with the gavel on the judge's desk, crying, "Order!"

"Don't make so much noise, Mr. Sheriff," said the judge, his face pink with his effort to restrain himself and maintain the dignity of the court.

"I will take a little chew myself," he added, stretching out his hand for Mr. Hoovey's "plug" of tobacco.

Mr. Hoovey remained as grave and apparently as feeble as before, and his thin old lips retained their former expression of innocent good faith and utmost courtesy. His voice seemed stronger. He told, with many fierce interruptions from Mr. Snatcher, the story of his youth, how he had started out to make his living as a hired man upon this farm, how he had saved and saved and at last had bought the farm by paying a little at a time. In going thus far he had been asked to "speak louder" fifty times by Snatcher, the judge, and his own lawyer. He had wandered into a thousand by-paths. Snatcher had snorted objections every time. His own counsel had said: "Yes, let us resume the subject of your possession and inclosure of the land," to which Mr. Snatcher had violently objected. And Mr. Smalkins, with the young lawyer's sensitiveness, had bristled up.

But the judge had said: "Stick to the main question, Mr. Hoovey. Just answer your lawyer's questions,"—and Mr. Snatcher had entered an exception—"emphatically I enter an exception." The jury seemed puzzled and looked at Mr. Hoovey, old, pathetic, inaudible, and exasperating. "Give Mr. Snatcher an exception, Mr. Clerk," said the judge. "Now let us go on."

The juror on the end looked at the clerk again, expecting him this time at least to hand Mr. Snatcher something, but instead the clerk scratched violently in a large book with his pen, and Mr. Smalkins went on with his questions.

"You say that you put 20 acres under fence separately,—how long ago was it?"

"Well," said Mr. Hoovey, "it was when I bought that Jersey heifer from Sim Cooper,—he's here now. She was a red heifer, white marked in the forrid. Every time I put that heifer in that place she'd get out. She destroyed a dozen rows of young lettuce for me one day. She warn't vicious, you understand—not at all, but"—

"I object," said Mr. Snatcher. "The heifer is not on trial now."

"The objection to the heifer is sustained," said the judge.

"She was a good heifer, Judge," said Mr. Hoovey.

"But when was that?" pursued Mr. Smalkins.

"Well, as I was sayin'," continued Mr. Hoovey, "this heifer"—

"I object," cried Mr. Snatcher angrily.

"Yes, yes," said the judge, "we must try to get along without the heifer; though, Mr. Snatcher, if Mr. Hoovey finds her essential, I do not see how the heifer can prejudice your client."

"I object," said Snatcher doggedly.

"Very well. Now, Mr. Hoovey, tell your story without the heifer."

"But Judge, she broke into a political meetin' on my place, and you were speakin', and it broke up the meetin'. You recollect that. It was your first race for judge, and I voted for you, and you got elected, and I've voted for you ever sense."

"I object," said Mr. Snatcher.

"When was that?" asked Mr. Smalkins.

"The judge knows," said Mr. Hoovey, "it's been a long time. His hair was brown then."

"I'm not a witness," said the judge. "You must fix it by somebody else."

Then he came off the bench, and, going over to one side of the court room, walked up and down with his hands behind him and his white head bent forward. "Go on," he said.

"What else happened that year?" asked Mr. Smalkins.

"I object," said Snatcher. The old judge did not hear.

"That year,—that year," puzzled Mr. Hoovey, "well, the judge here was elected and that year or the next a heap of prominent men was elected. Abraham Lincoln was elected that year. That heifer"—

"I object." Snatcher, with an air of finality, rose and looked at the judge, walking up and down.

"Come, Mr. Snatcher," said the judge,

roused from reverie, "forget the heifer, an innocent beast. You seem to have an aversion to heifers as some persons have to cats. I rule that the heifer is relevant."

"I enter an exception." Mr. Snatcher sat down.

"Yes," said the judge, "go on. You kept that tract under fence,"—

"Till it rotted down," said Mr. Hoovey feebly. "And a year ago Casper Immerhorn there grabbed the land under his old fixed-up deed." The defendant, Immerhorn, a large, teary, moon-faced blond man, who had not manifested the slightest change of expression from the beginning, now looked steadily at Mr. Hoovey, his round blue eyes bestowing upon him a lachrymose attention. To everybody's surprise, however, he leaned over to his lawyer, Mr. Snatcher, and said audibly:

"He done bodder me mit bistols and guns." Mr. Snatcher waved him to silence, and took up with ferocity the cross-examination of plaintiff, Hoovey.

Mr. Hoovey, retracing the history of the land and the heifer, feebly answered, developing more clearly the story of his rugged, hardworking life, crowned with measurable success, disfigured by excess, ignorance, violence. The old man dispassionately and faintly told it all. There were many lapses in memory, many absurd and even contradictory statements. Many an animal wandered in and out of the tale beside the heifer. It divided into so many branches, subdivisions, and blind alleys that Mr. Snatcher was nearly beside himself. The old judge, lost in thought, paced up and down. Mr. Smalkins controlled his impulse to clear up misunderstandings, adhering to an intuitive conviction that it was best not to interfere. In the end the impression stood out vivid and distinct,—the cleared fields, the low farmhouse, the dense woodland, and the farm figures that moved against the horizon. It cut into the memory with the power of reality.

"How about the other 9 acres?" asked Mr. Snatcher of the almost exhausted Mr. Hoovey. Then Mr. Smalkins remembered with such a tingle as only a young lawyer can feel, that he had neglected to prove this very important part of his case. But Mr. Snatcher rapidly made good his omissions.

"How about the other 9 acres?" he repeated.

Mr. Hoovey roused himself and color came into his face. "I put a fence all round outside it in a circle," said he, "a long time ago. The 9 acres is covered with trees,—forest trees, beeches, poplars, and oaks. And it's all grown up in underbrush 'cept 1 acre in the center," and his lips trembled.

"How long ago did you plant those trees,—since this suit began?" sarcastically inquired Mr. Snatcher.

"No, sir!" said Mr. Hoovey. "I planted them when I got married. My wife wanted to save them woods and I wanted to clear the land. I was keen to make money more'n ever, being just married and having somebody to work for. And she was all for trees and flowers. And she didn't want me to cut down the beeches and poplars and oaks. And I'd a done anything in heaven or earth that she wanted, and so I promised her not to cut 'em down. And I planted some more trees there to please her,—maples and ash and locusts all around outside them woods, in the fence corners, and they growed and they're big trees now."

"Judge, you remember my wife," he went on with animation, looking over at the judge. "You recollect her. She was a slender gal, bright brown eyes—yaller hair, ruther tall—smilin' and pleasant. You knew her well. Don't you recollect when you was speaking that time,—that was when I met her?"

How animated the old man had grown. Long years had rolled away. He continued: "That heifer—"

Snatcher fell back in his seat with a look of despair.

"I object," he said. But Mr. Hoovey went on—

"That heifer that broke up the meetin' had me chasin' and runnin' about after her, and my wife—I hadn't met her then—just laughed and laughed. I saw her fust that day. She had on a blue dress. It warn't long before I married her,—a young thing—even to me. And we had a little boy. And a year or two after

that they both died. And I buried 'em both in them woods—them 9 acres; and there they are now"—his voice broke. "And I want to say right here that nobody can take them woods away from me. I don't keer whut you say. Them woods is mine, and them two buried there are mine, and nobody can have 'em unless they pass over my dead body to git 'em.

—"She was the sweetest and the best and the kindest woman in the world, and the little boy was like her."

He had been sitting upright, his voice and frame all fire and animation, eyes flashing, cheeks flushing, hair thrown back, his strong old features working. But now he sank down in a heap again, tears rolling from his eyes. He looked fully his great age.

"Yes, it's been a long time," he went feebly on, "I was not old then. I was a fresh, sober, youngish man with plenty of hope and a wife and a child. I've got more money now, but nothin' else. You want to know how long it's been. Why, it seems nigh onto one hundred years."

He ceased. Mr. Smalkins turned his misty eyes away from the jury. But the jurors themselves were gazing with sympathy at Mr. Hoovey. It was plain that their hearts were with the old man. The judge cleared his throat. Mr. Snatcher frowned. The large blue eyes of the impassive defendant, Immerhorn, clouded. He spoke briefly in low tones to his lawyer, Mr. Snatcher. One could hear the words "bistols" and "I didn't want dat land." Mr. Snatcher got up and said:

"Judge, my client is a neighbor of this old man. He wants to be on good terms with him. He would never have taken that land, though his deed, which is an older deed, calls for it, but for the fact that Mr. Hoovey sometimes gets drunk and comes over to his home and fires pistols and lords it over him. He is a peaceable German milkman and he doesn't understand pistols. He is willing to let Mr. Hoovey have judgment for the land if he will quit,—but the costs—the witness fees are large."

The judge seemed pleased, saying to the clerk: "Let the foreman sign a verdict. Mr. Sheriff, call up the witnesses."

"Ladies and gentlemen," said his Honor, bowing to the throng, "you'll be glad that your neighbors want to patch up their differences. I know that you don't care to make claims for witness fees in a case like this. Do you now?"

They all shook their heads and smiled —except one little woman with tanned, freckled, anxious face, who had pushed quite close to the judge's desk.

"I want my witness fees, Judge," said she.

"Certainly, Madam," said the judge gallantly, taking out of his pocket a dollar and handing it to her.

"You can all go home now," he said to the witnesses.

"Gentlemen of the jury, keep your seats. We will call another case."

Editorial Comment

"Let's choose executors and talk of wills."—Shakespeare

Case and Comment

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Soldiers' and Sailors' Wills

THE mobilization of the National Guard for service on the Mexican border invests the subject of soldiers' and sailors' wills with more than usual interest and importance. The imminent dangers, the diseases, disasters, and sudden death constantly besetting soldiers and sailors, the utter inability oftentimes to find the time or means to make a deliberate and written testamentary disposition of their effects, have very generally led to the making of an exception in their favor, under certain circumstances, from the statutory requirements for the making of a valid will. Such circumstances being present, no particular formalities are necessary, though there must be clear and satisfactory evidence of testamentary capacity and the *animus testandi*. Hubbard v. Hubbard, 8 N. Y. 196. The very essence of the privilege consists in the absence of all ceremonies as legal requisites. Ex parte Thompson, 4 Bradf. 154. Such a will may be established by the testimony of only one witness. Gould v. Safford, 39 Vt. 498; Ex parte Thompson, supra.

A minor is entitled to the benefit of the privilege. Farquhar's Goods, 4 Notes of Cases, 651; Hiscock's Goods, L. R. [1901] P. 78, 70 L. J. Prob. N. S. 22, 84 L. T. N. S. 61, 17 Times L. R. 110; Vernon's Will [1915] Vict. L. R. 699. It extends to all members of the service, irrespective of rank or the nature of the duty to which they may be assigned.

A soldier's or seaman's will may be contained in a letter the larger portion of which is not testamentary (Parker's Goods, 5 Jur. N. S. 553, 28 L. J. Prob. N. S. 91, 2 Swabey & T. 375; Rae's Goods, 27 Ir. L. R. 27 Eq. 116; Anderson v. Pryor, 10 Smedes & M. 620); and though the writer expresses an intention of making a formal will (May v. May, L. R. [1902] P. 103, note, 86 L. T. N. S. 120, 71 L. J. Prob. N. S. 34, 18 Times L. R. 184; Herbert v. Herbert, Deane & S. Eccl. Rep. 10).

But it is essential to remember that a will made by a soldier or a sailor without the usual formalities is not operative as to real estate (see Pierce v. Pierce, 46 Ind. 86); and that the privilege is accorded only to soldiers "in actual military service" or seamen "at sea." The term, "actual military service," signifies the exercise of military functions in the enemy's country in time of war, or in the soldier's own state or country in case of invasion or insurrection. Van Deuzer v. Gordon, 39 Vt. 111. According to the earlier decisions it does not apply to the

soldier who is in regular quarters, or at his customary home on leave of absence (see Re Smith, 6 Phila. 104), or to a soldier mustered into service of the United States while he remains in barracks or is quartered at any permanent military depot in a state not exposed to the incursion of the enemy. Leathers v. Greenacre, 53 Me. 561; Van Deuzer v. Gordon, supra. But an informal written will made while at home may become a voluntary testament by its recognition in a letter written while at the front, as expressive of the soldier's testamentary desires. (See Van Deuzer v. Gordon, supra.) The English courts, however, have latterly inclined to extend the term to a soldier who has been mobilized but who has not yet departed for the scene of hostilities. See Hiscock's Goods, supra (where testator, a volunteer, had gone into barracks as the first step toward joining the field forces); Stopford v. Stopford, 19 Times L. R. 185 (a soldier in barracks on the day of sailing for South Africa, where the Boer War was going on); Gordon's Goods, 21 Times L. R. 653 (a soldier stationed in Woolwich, under orders to report to a regiment, about to sail for South Africa in anticipation of the Boer War); Cory's Goods, 84 L. T. N. S. 270; May v. May, L. R. [1902] P. 103, note, 71 L. J. Prob. N. S. 34, 86 L. T. N. S. 120, 18 Times L. R. 184 (will made on vessel sailing to South Africa). The test, it is said in Hiscock's Goods, supra, is whether a soldier has taken some step, however small, towards joining the forces in the field. Mobilization for naval service is, however, not enough; the testator must be "at sea," or, if on shore, in the course of a voyage. See Anderson's Estate, L. R. [1916] P. 49, 32 Times L. R. 248; M'Murdo's Goods, L. R. 1 Prob. & Div. 540, 37 L. J. Prob. N. S. 14, 17 L. T. N. S. 393, 16 Week. Rep. 283. In Rae's Goods, Ir. L. R. 27 Eq. 116, a letter written on board a vessel the day before it sailed on foreign service was held entitled to probate as the will of a "seaman being at sea."

It is not necessary, in the absence of an express statutory provision to that effect, that the testator be *in extremis*, but it is sufficient that he is constantly exposed, or liable to be constantly exposed, to death. Botsford v. Krake, 1 Abb. Pr. N. S. 112; Leathers v. Greenacre, 53 Me. 561; Van Deuzer v. Gordon, 39 Vt. 111; Ex parte Thompson, supra. The courts do not agree, however, as to whether a soldier or sailor may make a valid oral will without being *in extremis*, although the point seems to have been expressly decided only in Re O'Connor, 65 Misc. 403, 121 N. Y. Supp. 903, in which it was said that the fear of death is sufficiently furnished by the perils of the sea or the presence of the enemy.

There is some authority to the effect that an informal will made while in active military service, unless revoked, continues in force during the testator's lifetime. See Leese's Goods, 17 Jur. 216; Re Smith, 6 Phila. 104; Re O'Connor, supra.

A soldier who is well advised will, however, execute a will with the usual formalities, and cause it to be deposited in a place of safety, rather than rely on the privilege accorded to him by law.—E. S. Oakes.

Attestation of Will of Blind Testator

THE will of a blind man is held to be signed by the witnesses in his presence, within the meaning of the statute, in the North Carolina case of Re Allred, — N. C. —, 86 S. E. 1047, L.R.A.1916C, 946, if they are within 4 feet of him in the same room when they write their signatures, and he knows by the sense of hearing that they are signing the paper.

The rule is laid down in the note appended to the report of the case in L.R.A. that an attestation of the will of a blind testator is in his presence if it is done within the reach of his remaining senses, and he is conscious of what is being done and may if he chooses ascertain that the witnesses are subscribing his will.

This doctrine is supported by Ray v. Hill, 3 Strobh. L. 297, 49 Am. Dec. 647. In this case the attestation was within 2 feet of the testator; the witnesses were of the opinion that it was so near the

testator that he must have been aware of what was being done. One of them stated he might have heard the scratching of the pen and might easily have touched the witnesses, if he had chosen to do so.

The will of a blind testator attested by witnesses in the same room with him was sustained in Boyd v. Cook, 3 Leigh, 32.

The presumption arising from a certificate of due attestation declaring all the steps required by the statute to have been taken is held not overcome in Arneson's Will, 128 Wis. 112, 107 N. W. 21, by testimony that one of the witnesses affixed her signature in the same room with the testator, although it might be believed that, because of the testator's eyesight being dim, he did not actually see the act of writing.

An attestation of a blind testatrix in such a position that she could have seen had she had her eyesight was sustained in Piercy's Goods, 1 Rob. Eccl. Rep. 278, 4 Notes of Cases 250. By reason of there not being any table or other convenience in the bedroom where the testatrix lay, on which the witnesses could sign their names, they proceeded immediately to an adjoining room on the same floor, across a landing or passage, and there, in view of the bedroom, the doors of both rooms being open, subscribed their names. It was shown by the witnesses that the testatrix could, had she had her sight, have seen from the bed the witnesses subscribe.

Attitude of Law to Employee

AN interesting statement concerning the evolution of the principles now embodied in the employers' liability acts of many states was made by Chief Justice Clark of North Carolina in his dissenting opinion in Vogh v. F. C. Geer Co. — N. C. —, 88 S. E. 877, where he states: "After the battle of Waterloo in 1815, when England terminated the twenty-five years' struggle with France, she did not give pensions to the soldiers disabled in that contest or subsequently destitute (notwithstanding the peerages and enormous sums granted to a few generals), but in lieu thereof rewarded them by a "permission to beg" if found needy and deserving, coupled with a provision that if any soldier should beg without such permission from his commanding officer, or of some court, he should be hanged. The attitude as to the 'soldiers of industry,' the laborers upon whose exertions civilization rests, has also changed very slowly. It was long held by the courts that when a laborer was injured, though he might be one of many thousands in a common employment, yet if any other laborer was in anywise guilty of negligence which contributed to the injury of the laborer, the employer was not liable. It was first pointed out in this state by the opinion in Hobbs v. Atlantic & N C. R. Co. 107 N. C. 1, 12 S. E. 124, 9 L.R.A. 838, that this doctrine had been created by the courts, and not by any statute.

Thereafter, doubtless in consequence of that decision, the General Assembly enacted chap. 1897, Pr. Laws, chap. 56, now Rev. 2646, which repealed the doctrine as to railroad employees, and also deprived the defendant in such cases of the defense that the employee 'assumed the risk.' This statute was before the court on several occasions, but was settled finally in favor of its constitutionality in Coley v. North Carolina R. Co. 128 N. C. 534, 39 S. E. 43, 57 L.R.A. 817, reaffirmed on rehearing in 129 N. C. 407, 40 S. E. 195 ,57 L.R.A. 834 (though two judges dissented), and has ever since been held valid in this state. The modern and just doctrine that when there are large numbers of employees the 'business shall bear the loss' from injury to an employee, and that the whole burden shall not fall, as heretofore, with crushing effect upon the unfortunate employee and his dependent family, is now the attitude of the law as it has been expressed by legislation, and later by the courts."

Among the New Decisions

Him, the same laws, the same protection yields, who ploughs the furrow, or who owns the field.—Savage.

Abatement — employers' liability act — survival of action for instant death. The provision of the Federal employers' liability act that the right of action given thereby to a person suffering injury shall survive to his personal representative is held not to apply in case of instant death, in Carolina C. & O. R. Co. v. Shewalter, 128 Tenn. 363, 161 S. W. 1136, Ann. Cas. 1915C, 605, to which is appended a note in L.R.A. 1916C, 964, on instantaneous death as test of right of action or amount of recovery.

Appeal — award of damages — interference. That a jury's award for wrongful death should not be disturbed for mere difference of opinion as to the inadequacy or excess of the award, even if considerable, is held in Lane v. United Electric Light & Water Co. 90 Conn. 35, 96 Atl. 155, which is accompanied in L.R.A. 1916C, 808, by a note on the rules guiding the courts on appeal in determining the excessiveness or adequacy of verdicts for personal injuries resulting in death.

Bulk sales law — validity. The act of April 18, 1913, to amend §§ 11102 et seq., General Code, relating to the transfer of stocks of merchandise and fixtures other than in the usual course of trade (103 O. L. 462), is held a valid enactment not repugnant to the state or Federal Constitutions in the Ohio case of Steele, H. & M. Co. v. Miller, 110 N. E. 648, L.R.A. 1916C, 1023.

Carrier — delivery to — loading in car. The loading of goods on a detached box car at a public siding distant from the railroad station and freight office, and with no participation by the railroad employees beyond placing the car, the understanding and custom being that shipper was allowed forty-eight hours to load, and that the agent at the nearest freight station should be notified when the loading was complete, is held not to constitute a delivery to the carrier in the New Jersey case of Standard Combed Thread Co. v. Pennsylvania R. Co. 95 Atl. 1002, annotated in L.R.A. 1916C, 606, when the loading was complete in less than forty-eight hours, and no notice of such completion was given to the company.

Carrier — flag station — signal — passenger. Where one goes to a flag station on the line of a railroad company, at which passenger trains are accustomed to stop to take on passengers upon being signaled, and gives a proper signal to indicate his intention to get upon an approaching passenger train, it is held in the Georgia case of Georgia & F. R. Co. v. Tapley, 87 S. E. 473, annotated in L.R.A. 1916C, 1020, that he does not ipso facto become a passenger.

Commissions — jurisdiction — dispute as to number of telephone messages sent by subscriber. That the New York Commission has no jurisdiction over a dispute between a telephone company and a subscriber as to the number of messages sent from his telephone, is held in Ostro v. New York Teleph. Co. P.U.R. 1916B, 244.

Conspiracy — to compel breach of contract with nonunion labor. A combination among members of a labor union to coerce a building owner by means of strikes against the subcontractor, by whom members of their union are employed, to cancel a contract for the use of a patented process of applying plaster to the outside of the building unless its operatives are unionized, is held unlawful in New England Cement Gun Co. v. McGivern, 218 Mass. 198, 105 N. E. 885, annotated in L.R.A. 1916C, 986.

Conspiracy — to corrupt officer — service of detective. An indictment charged a conspiracy to pervert the due administration of the laws. The proof was of an agreement by defendants with a detective in the employ of the state's law officers to detect defendants in corrupt conduct, by which the detective was to pay them money for their votes as members of a city council. Held in the New Jersey case of State v. Dougherty, 96 Atl. 56, L.R.A. 1916C, 991, that, as the indictment charged but one conspiracy, to which the detective was proved to be a necessary party, and as his object was to expose corruption, and prevent injury to the public, there was a failure to prove a conspiracy to pervert the due administration of the laws.

Constitutional law — police power — class legislation — secondhand material. The novel question of the constitutionality of a regulation respecting the use of secondhand material in manufacturing processes was considered in the Illinois case of People v. Weiner, 110 N. E. 870, L.R.A. 1916C, 775, which holds that forbidding the use in making for sale any mattress, quilt, or bed comforter of cotton made secondhand by use about the person and the sale of such articles so made, is an unconstitutional deprivation of property without due process of law. The case further determines that forbidding the use of secondhand material in making for sale any mattress, quilt, or bed comforter, while permitting it in the making of pillows for sale, is unconstitutional class legislation.

Contract — not to re-engage in business — general restraint of trade. A covenant by a corporation selling its rights in a particular article in the sale of which it did an international business, together with the machinery, patterns, and dies for its manufacture, not again to engage in the manufacture of such article, will be enforced, it is held in Hall Mfg. Co. v. Western Steel & Iron Works, 227 Fed. 588, accompanied by annotation in L.R.A. 1916C, 620, although it is without limitation of either time or place.

Damages — amount — suffering. Eleven thousand dollars is held excessive in St. Louis, I. M. & S. R. Co. v. Craft, 115 Ark. 483, 171 S. W. 1185, as an allowance of damages for suffering by one whose body was mangled and whose intestines were lacerated by a railroad car, and who was pinned face down beneath the car for fifteen minutes, a part of which time a wheel rested on his body, and who is compelled to wait fifteen minutes more before the arrival of an ambulance, but a judgment of $5,000 may be allowed, although he dies shortly after being placed in the ambulance.

The subject of excessive or inadequate damages for personal injuries resulting in death is treated in the note appended to the foregoing decision in L.R.A. 1916C, 817.

Damages — breach of warranty of seed — liability to consumer. A dealer in seed, who, with knowledge that it is to be resold to consumers, sells to a dealer under warranty that it is of a certain kind, is held liable in damages for the breach of warranty in Buckbee v. P. Hohenadel Jr. Co. 139 C. C. A. 478, 224 Fed. 14, annotated in L.R.A. 1916C, 1001, where the seed is resold under the same

warranty, for the difference in market value between the crop actually produced, and that which would have been produced had the seed been as warranted.

Death — abandonment of family — recovery under Federal employers' liability act. Abandonment by a man of his family, it is held in Fogarty v. Northern P. R. Co. 85 Wash. 90, 147 Pac. 652, annotated in L.R.A. 1916C, 803, will not defeat a recovery by them for his death, under the Federal employers' liability act, if his legal liability still remained, and earning power and capacity on his part existed so that, had he lived, the legal right to pecuniary assistance might have been enforced as a thing real and measurable.

Descent — children of bigamous wife — effect of statute. That children of a man by a woman whom he married while having a lawful wife living inherit with his children by the former wife under a statute providing that the issue of all marriages deemed null in law shall be deemed and considered as legitimate is held in Evatt v. Miller (Evatt v. Mier), 114 Ark 84, 169 S. W. 817, which is accompanied in L.R.A. 1916C, 759, by a note on the effect of a statute legitimating the issue of a void or voidable marriage.

Descent — property received from relative — return to heirs. Land devised by a man to his sister, in case of her death intestate and without issue does not descend it is held in the Rhode Island case of Arnold v. O'Connor, 94 Atl. 145, to the children of testator to the exclusion of those of her other brothers and sisters, under a statute providing that when the title to any real estate of inheritance as to which the person having title shall die intestate came by devise from kindred of intestate, and such intestate dies without children, such estate shall go to the kin next to the intestate of the blood of the person from whom the property came.

The descent of ancestral estates is treated in the note appended to the foregoing case in L.R.A. 1916C, 898.

Discrimination — gas — free service — ordinance requirements. That the furnishing of "free gas" to cities in compliance with ordinances granting the use of streets discriminates against consumers required to pay scheduled rates, and should therefore be discontinued, is held in the Kansas case of Landon v. Lawrence, P.U.R. 1916B, 331.

Discrimination — rates — electricity — exclusion of similar service from rate. That the exclusion of ordinary housekeeping electrical devices from participation in a rate for heating and cooking devices is discriminatory, is held in the Vermont case of St. Albans v. Vermont Power & Mfg. Co. P.U.R. 1916B, 293.

Discrimination — rates — waiver of limitation for filing claim for reparation. That a utility cannot waive the defense of the statute of limitations for filing reparation claim, is held in the California case of James Mills Sacramento Valley Orchard and Citrus Co. v. Southern P. Co. P.U.R. 1916B, 734, since pleading the limitation against some and waiving it against others constitutes unlawful discrimination.

Elevator — duty and responsibility of owner for inspection. One maintaining an elevator in his store for the accommodation of customers is held bound in Rumetsch v. Wanamaker, 216 N. Y. 379, 110 N. E. 760, L.R.A. 1916C, 1245, although it is installed by a reputable concern, to employ persons of reasonable skill and experience to inspect it with such frequency as shall be reasonably required in view of its use, and is responsible for their negligence in the performance of their work.

Eminent domain — irrigation — use in sister state. The right of eminent domain, it is held in Grover Irrig. & Land Co. v. Lovella Ditch, Reservoir & Irrig. Co. 21 Wyo. 204, 131 Pac. 43, Ann. Cas. 1915D, 1207, L.R.A. 1916C, 1275, cannot be exercised to acquire property rights in aid of an enterprise for the irrigation of lands in another state, notwithstanding there may be incidental

benefits to residents of the state where the property sought is situated by creating a new channel for the employment of capital and labor.

Eminent domain — right to abandon proceedings. The confirmation by the court of an unconditional report of commissioners of appraisement in eminent domain proceedings is held to terminate the power to abandon the proceedings in Re Palisades Interstate Park, 216 N. Y. 104, 110 N. E. 260, which is accompanied in L.R.A. 1916C, 641, by a note on the right to dismiss condemnation proceedings after confirmation of award or after judgment.

Estoppel — encouraging nuisance — injunction. That the owner of an apartment house cannot, after encouraging the erection of private garages in the neighborhood for the accommodation of it and its tenants, enjoin their use because their operation in an ordinarily careful manner proves to be a nuisance, is held in the Washington case of Mahoney Land Co. v. Cayuga Invest. Co. 153 Pac. 308, to which is appended in L.R.A. 1916C, 939, a note as to estoppel, by encouraging or acquiescing in the erection of a building or plant, to complain of it as a nuisance.

Extradition — rendition to third state. That a state may, under the provision of the Federal Constitution requiring the delivery of a person who has fled from justice and is found within the limits of a state, surrender to one state a person whom it has extradited from another upon a charge which is not substantiated, without returning him to the latter, although the Federal statute provides for rendition only by the state to which the fugitive has fled, is held in the Texas case of Ex parte Innes, 173 S. W. 291, annotated in L.R.A. 1916C, 1251.

False imprisonment — liability of judge — facts without jurisdiction. A judge is held liable in damages for false imprisonment in the Kentucky case of Rammage v. Kendall, 181 S. W. 631, L.R.A. 1916C, 1295, who imposes a fine upon a witness, for default in payment of which he is imprisoned, when he acknowledges guilt of a crime within the jurisdiction of the court while testifying in another case, if the witness does not consent to trial and no papers are served upon him so as to bring him within the jurisdiction of the court.

False pretenses — misreporting market price. One who, for a series of years, sells live stock to a company engaged in the business of buying it, above the market price, by misrepresenting such price to it, is held not within a statute providing punishment for one who obtains money from another by means of any trick, deception, or false or fraudulent representation, statement, or pretense, or by means of the confidence gained, in the Missouri case of State v. Aikins, 180 S. W. 848, which is accompanied in L.R.A. 1916C, 1101, by supplemental annotation concerning the offense of obtaining money by false pretenses as affected by the absurdity or improbability of representations or by the prosecutor's failure to investigate the same.

Husband and wife — divorce — remarriage — prematurity — validity. The remarriage of the divorcee within a few hours of the expiration of the time for taking an appeal from the decree is not rendered void in Wallace v. McDaniel, 59 Or. 378, 117 Pac. 314, by a statute forbidding and making absolutely void the remarriage of every party to a decree of divorce until decision of the case upon appeal, or expiration of the time for taking an appeal, where the perfecting of an appeal within the time remaining would have been practically impossible, since the right to it might have been waived for such a short period of time.

The validity and effect of a marriage contracted within the prohibited time after divorce is the subject of the note appended to the foregoing case in L.R.A. 1916C, 744.

Husband and wife — marriage — prior husband living. A marriage by a woman having another husband living and undivorced is held void, and not voidable in Goset v. Goset, 112 Ark. 47,

164 S. W. 759, under a statute providing that no subsequent or second marriage shall be contracted by any person during the lifetime of any former husband undivorced.

This decision is accompanied in L.R.A. 1916C, 707, by a note as to whether a bigamous marriage is void or voidable.

Inheritance tax — on dower right. A statute imposing a tax on all property passing by will or the statutes of inheritance is held not to apply to the interest passing to a widow under a statute giving her a third of the real property which her husband possessed during marriage in the Utah case of Re Bullen, 151 Pac. 533, to which is appended supplemental annotation in L.R.A. 1916C, 670, as to succession tax on property received by surviving spouse.

Insurance — agreement for extension — power of agent. Under the provisions of the standard form of insurance policy it is held in the Oklahoma case of Oklahoma F. Ins. Co. v. Fay Mercantile Co. 153 Pac. 127, that an agent has no power to bind the company, without its authority, by an agreement with the assured that he will renew the policy on its expiration.

The validity of the agreement of an agent to renew a policy in the future is treated in the note appended to the foregoing decision in L.R.A. 1916C, 779.

Insurance — mutual benefit certificate — change of beneficiary — contract rights. The change by a man, without the knowledge or consent of his wife, of the beneficiary in a mutual benefit certificate upon his life, is held a breach of his antenuptial contract to take out the certificate in her favor, in Ryan v. Boston Letter Carriers' Mut. Ben. Asso. 222 Mass. 237, 110 N. E. 281.

The rights and remedies of a prior beneficiary, where the insured was mentally incompetent, when he made a change of beneficiaries, or the change was accomplished by fraud or undue influence, are considered in the note appended to the foregoing decision in L.R.A. 1916C, 1130.

Insurance — mutual benefit society — increase of rates — right to complain. A member of a mutual benefit society which has authority to amend its constitution and by-laws and change its rates, who has contracted that his contract shall be controlled by all laws then in force or that might thereafter be enacted, is held not entitled to complain of an amendment raising his rate of assessment in the Mississippi case of Neuman v. Supreme Lodge, K. P. 70 So. 241, L.R.A. 1916C, 1051.

Lewdness — nuisance — living as man and wife. For a man and woman known by the community not to be married to each other, to live together as man and wife, is held a public nuisance in Adams v. Com. 162 Ky. 76, 171 S. W. 1006, which is accompanied in L.R.A. 1916C, 651, by a note on illicit cohabitation as a nuisance or criminal offense.

Marriage — insane person — annulment after death. A marriage of a person who was mentally incompetent, it is held in Re Gregorson, 160 Cal. 21, 116 Pac. 60, Ann. Cas. 1912D, 1124, cannot be treated as void after his death, where the statute provides that such marriages may be annulled except in case of free cohabitation after restoration of reason, in an action by the party injured, or relative or guardian of a party of unsound mind, at any time before the death of either party, while certain other classes of marriages are made absolutely void.

Whether mental incompetency renders a marriage void or voidable only is considered in a note appended to the foregoing decision in L.R.A. 1916C, 697.

Marriage — minority — nullification. A statute, forbidding under criminal penalties the performance of a marriage ceremony without the issuance of a license, and the issuance of a license for the marriage of a minor without the consent of the parent or guardian, is held not to authorize the annulment of a marriage entered into by a minor without such consent, in Browning v. Browning, 89 Kan. 98, 130 Pac. 852, Ann. Cas. 1914C, 1288, accompanied in L.R.A.

1916C, 737, by a note on validity of marriage of persons of nonage.

Marriage — minors — effect of statute. A marriage of minors over the age fixed by the common law, but under that mentioned in the statute, is held not prohibited in Cushman v. Cushman, 80 Wash. 615, 142 Pac. 26, L.R.A. 1916C, 732, by a statute permitting marriage by males of the age of twenty-one and females of the afe of eighteen, making marriages voidable when either party is incapable of consenting thereto, and requiring for the securing of a license an affidavit that the male is over twenty-one and the female over eighteen years of age, or has the written consent of parent or guardian, although they have not secured the required consent.

Marriage — void — right to ignore. A marriage, it is held in Taylor v. White, 160 N. C. 38, 75 S. E. 941, cannot be annulled because one of the parties was at the time married to another, if a decree has been entered by a court of competent jurisdiction, even after the second marriage was contracted, adjudging the prior one void ab initio because procured by duress, and it had never been ratified.

The question whether a marriage accomplished by duress is void or voidable is treated in the note accompanying the foregoing case in L.R.A. 1916C, 704.

Marriage — within prohibited time after divorce — recovery of property conveyed. A divorced person who remarries within the time prohibited by statute, is held not entitled in Szlauzis v. Szlauzis, 255 Ill. 314, 99 N. E. 640, Ann. Cas. 1913D, 454, L.R.A. 1916C, 741, to recover property conveyed to the second wife to induce her to enter into the marriage, where the statute makes such marriage void and a misdemeanor, although she acted with an ulterior purpose to secure possession of the property and abandon him.

Master and servant — assault by co-employee — liability. A master is held not liable, in Arkansas National Gas Co. v. Lee, 115 Ark. 288, 171 S. W. 93, L.R.A. 1916C, 1200, for an assault upon a superintendent of one department of his work by an assistant superintendent of another department, in furtherance of a conspiracy between himself and the superintendent of that department to force the person assaulted out of the master's employment.

Master and servant — employers' liability — servant engaged in interstate commerce. An employee in a machine shop operated by a railway company for repairing parts of locomotives used by it both in interstate and intrastate transportation is held not employed in interstate commerce in Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, 60 L. ed. —, 36 Sup. Ct. Rep. 188, L.R.A. 1916C, 797, within the meaning of the Federal employers' liability act while engaged in taking down and putting into a new location in such shop an overhead countershaft through which power is communicated to some of the machinery used in repair work.

Master and servant — injury to eye — infection — course of employment. A gonorrheal infection of an eye in attempting to remove a piece of steel which flew into it in the course of employment is held to arise out of and in the course of employment within the operation of a workmen's compensation act, in the Michigan case of Cline v. Studebaker Corp. 155 N. W. 519, L.R.A. 1916C, 1139.

Master and servant — workmen's compensation — dependent — wife living apart from husband. A woman who, to effect a reconciliation of differences with her husband, has left him, and is teaching school, is held not living with him, in the Michigan case of Finn v. Detroit, Mt. C. & M. City R. Co. 155 N. W. 721, L.R.A. 1916C, 1142, within the meaning of a provision in a compensation act that one so living shall be conclusively presumed to be dependent on him, although he contributes to her support, and she at all times intends to return as his wife, and is with him after the accident, before he dies.

Master and servant — workmen's compensation act — injury to sheriff. That a sheriff is not an employee of the state within the operation of a workmen's compensation act which renders the state liable for injury to its employees, but defines an employee as any person who has entered into or works under contract of service with an employer, is held in Sibley v. State, 89 Conn. 682, 96 Atl. 161, L.R.A. 1916C, 1087.

This seems to be a case of first impression.

Master and servant — workmen's compensation — wife living apart from husband. A woman is not living with her husband, in Re Newman, 222 Mass. 563, 111 N. E. 359, L.R.A. 1916C, 1145, within the meaning of the provision of the workmen's compensation act that she shall be conclusively presumed to be wholly dependent when so living, where they have sold the furniture and he has gone into another state to work, while she labors to support herself and children, although he sends her money from time to time, and they have talked of resuming housekeeping, and are saving money for that purpose.

Railroad — flying switch — negligence. Where a railroad company makes a flying switch, in a vicinity where the employees know or should know there are likely to be human beings upon the track, with no brakeman on the cars to control them or to keep a lookout for pedestrians, such conduct is held gross negligence in the Oklahoma case of Wilhelm v. Missouri O. & G. R. Co. 152 Pac. 1088, annotated in L.R.A. 1916C, 1029.

Rates — railroad — factors to be considered — development of useless industrial by-product. That all the incidents and circumstances surrounding the development of a by-product of an industry into a merchantable article, should at least be kept in mind in resolving the doubt for or against an increase in the freight rate upon it, is held in the Ohio case of Re Advance in Commercial Slag Rates, P. U. R. 1916B, 257, even though it may be doubtful whether such facts are elements which, from a strictly legal standpoint, can be relied upon in fixing rates.

Reparation — necessity of showing loss sustained by excessive charge. A merchant is held in the Arizona case of Moore v. Ray & G. Valley R. Co. P. U R. 1916B, 637, not entitled to reparation for excessive freight charges where the selling price of the goods was fixed by adding the freight charges and his profit to the cost price.

Reparation — right to assign claim. That reparation will not be awarded to one who has obtained an assignment of the claim at a nominal price for speculative purposes, is held in the Arizona case of Moore v. Ray & G. Valley R. Co. P. U. R. 1916B, 637, since reparation is to repay the person who has suffered actual loss.

Rescission — against seller — double dealing of agent. Rescission, it is held in the Oregon case of Hall v. Catherine Creek Development Co. 153 Pac. 97, annotated in L.R.A. 1916C, 996, will be granted at the suit of the purchaser against one who, after employing an agent to sell his land for a commission, gives him an option to purchase with knowledge that he is interested in the promotion of a corporation to purchase it, to which he effects a sale, receiving a commission for his services.

Return — profits made upon plant improvements — profits realized through management of utility by stockholder. That profits on improvements and profits realized through the management of a utility by a corporation owning its stock are a part of the utility's return, is held in the Massachusetts case of Arlington Petition, P. U. R. 1916B, 363.

Schools — marriage of teacher — automatic dismissal. Under statutes providing permanent tenure for schoolteachers, and allowing their dismissal only for good cause shown, a rule providing that marriage of a woman teacher shall automatically vacate her position

is held unreasonable in the Oregon case of Richards v. District School Board, 153 Pac. 482, accompanied in L.R.A. 1916C, 789, with the cases on marriage as ground for non-appointment or dismissal of teacher.

Service — electric — option of consumer under two schedules — inspection. An electric utility, it is held in the Missouri case of Rhodes-Burford Home Furnishing Co. v. Union Electric Light & P. Co. P. U. R. 1916B, 645, should, during the normal peak-demand period peculiar to each class of business, make an inspection of the installation of each customer, of a class having the choice of more than one schedule, for the purpose of checking up his connected load, maximum or assessed demand or other conditions of use, and should study the consumer's monthly energy consumption for the past year, and secure any other reasonable data necessary to determine whether the consumer is still being served under the most advantageous schedule, although such inspection will not be required where one has been made at the beginning or during the consumer's present term of agreement.

Service — gas — discontinuance — notice — sufficiency of. That the printing of a rule on the back of a bill that gas service "may" be cut off under certain conditions is not sufficient notice of an actual intention to discontinue, is held in the New Jersey case of Re Wildwood Gas Co. P. U. R. 1916B, 816.

Specific performance — contract to sell certain number of acres out of tract. An unusual question arose in the Kentucky case of Roberts v. Bennett, 179 S. W. 605, L.R.A. 1916C, 1098, which holds that the vendor cannot enforce specific performance of a contract to sell his farm of 210 acres more or less in a certain locality, where the farm in that locality contains 304½ acres, from which he desires to convey two of the three parcels of which the farm consists, containing 214½ acres, since the description in the memorandum is not sufficient to satisfy the statute of frauds.

Specific performance — description — statement of quantity in tract. That specific performance will not be enforced of a contract to convey a parcel of land described merely by stating the quantity contained without locating it or giving information as to former owners which might lead to its identification, is held in Hall v. Cotton, 167 Ky. 464, 180 S. W. 779, which is accompanied in L.R.A. 1916C, 1124, by a note as to sufficiency of description of property by ownership or acreage without other particular description.

Subrogation — building contract — rights of surety. The obligee in the bond of a defaulting building contractor is held subrogated, in Johnson v. Martin, 83 Wash. 364, 145 Pac. 429, to the rights of the surety in a mortgage given by the contractor to indemnify him against liability, although by reason of insolvency the surety has not satisfied the bond, and the obligee did not know of the existence of the mortgage.

The right of an obligee to be subrogated to the security held by a surety is treated in the note appended to the foregoing decision in L.R.A. 1916C, 1057.

Sunday — printing newspaper — work of necessity. The publication of a daily newspaper on Sunday is a work of necessity within the exception of the Sunday law, and therefore, it is held in the Missouri case of Pulitzer Pub. Co. v. McNichols, 181 S. W. 1, that a contract for the printing of advertisements therein may be enforced.

Publication and sale of a newspaper on Sunday is the subject of the note appended to the foregoing decision in L.R.A. 1916C, 1148.

Tax — succession — estate by entireties. No succession tax is due upon an estate held by entireties upon the death of one tenant, under a statute imposing a tax on real estate which passes by the "laws regulating intestate succession," is held in Palmer v. Mansfield, 222 Mass. 263, 110 N. E. 283, annotated in L.R.A. 1916C, 677.

Tax — succession — joint tenancy. That no succession tax can be imposed

upon property held in joint tenancy upon the death of one of the tenants, where the tenants contributed equally to the acquisition of the property, and the statute provides for a tax upon property passing by the laws regulating intestate succession, is held in Atty. Gen. ex rel. Treasurer v. Clark, 222 Mass. 291, 110 N. E. 299, annotated in L.R.A. 1916C, 679.

Vendor and purchaser — forfeiture of land contract — effect on overdue instalments of purchase money. The exercise by the vendor of his contract right to declare a forfeiture of his contract to convey for default in payment of instalments of purchase money, followed by a decree of strict foreclosure of the rights of the vendee is held to preclude his recovery of overdue instalments of the purchase money, in the Vermont case of Waite v. Stanley, 92 Atl. 633, accompanied in L.R.A. 1916C, 886, by a note as to right of vendor to unpaid instalments of the purchase price where the contract has terminated or been rescinded for the default of the vendee.

Will — gift to stranger. Where a legacy is to a person other than a child of the testator, or to a person other than one to whom he stands in loco parentis, unless the gift is for the same specific purpose for which the legacy was intended, it is held in Ellard v. Ferris, 91 Ohio St. 339, 110 N. E. 476, annotated in L.R.A. 1916C, 613, that there is no presumption of such intention, but it must be clearly shown, either from the will itself or by extrinsic evidence, that an ademption was intended by the testator.

Recent English Decisions

Contract — restraint of trade — employer and employee—reasonableness. That a covenant by one employed by a concern engaged in the manufacture of a highly specialized form of machinery, that he will not at any time during a certain period from the date of his ceasing to be employed by such concern, within the United Kingdom carry on, or be concerned in, the sale or manufacture of the class of machinery made by the concern, or any business connected with it, is too wide in that it operates to prohibit the employee from using, not merely confidential knowledge acquired in the course of his employment, but knowledge forming a part of his general mental equipment, although such equipment includes the special skill and experience which he has gained in the course of his employment,—is held by the House of Lords in Herbert Morris v. Saxelby [1916] A. C. 688, affirming [1915] 2 Ch. 57.

Life estate — rights of life tenant and remainderman of corporate stock — distribution of reserve fund. A colliery company had invested undivided profits, held as a reserve fund, in the shares of a holding company which held shares in other colliery companies. All the colliery companies were merged in one company by an exchange of stock for stock of the new company, the holding company receiving shares in the combine for the shares in the constituent companies held by it. The holding company then went into liquidation, and the colliery company distributed the shares in the combine received by it, representing the reserve fund, by way of dividends among the ordinary shareholders. Upon this state of facts it was held in Re Thomas [1916] 1 Ch. 383, that the shares so distributed should, as between a tenant for life and the remainderman, be treated as income and not as capital.

Salvage — recapture of neutral vessels seized by enemy. Although by the law of nations the general rule is that no salvage is due for the recapture of a neutral vessel, upon the principle that the liberation of a bona fide neutral from the enemy confers no benefit upon the neutral, inasmuch as the enemy would be compelled by the tribunals of his own country to make restitution of the property thus unjustly seized, this rule is subject to an exception where the vessel recaptured was practically liable to confiscation by the enemy, whether rightfully or wrongfully. The Pontoporos, L. R. [1916] Prob. 100.

QUAINT and CURIOUS

Variety's the very spice of life
That gives it all its flavor.—Cowper

Maxims of Two Chief Justices. The following maxims laid down by the late Lord Russell of Killowen in a letter to his son, reproduced in Mr. Barry O'Brien's biography of the late Lord Chief Justice, may be very usefully contrasted with the maxims entered in his diary by John Scott, Earl of Clonmell, who was Lord Chief Justice of Ireland from 1784 till his death in 1798. A comparison of the maxims of the two Chief Justices will, we think, prove the progress in moral principles of which the century which intervened between them may justly boast. "1. Begin," writes Lord Russell, "each day's work with a memo. of what is to be done, in order of urgency. 2. Do one thing only at a time. 3. In any business interviews note in your diary the substance of what takes place,—for corroboration in any future difficulty. 4. Arrange any case, whether for brief or for your own judgment, in the order of time. 5. Be scrupulously exact down to the smallest item in money matters, etc., in your account of them. 6. Be careful to keep your papers in neat and orderly fashion. 7. There is no need to confess ignorance to a client, but never be above asking for advice from those competent to give it in any matter of doubt, and never affect to understand when you do not understand thoroughly. 8. Get to the bottom of any affair intrusted to you—even the simplest—and do each piece of work as if you were a tradesman turning out a best sample of his manufacture by which he wishes to be judged. 9. Do not be content with being merely an expert master of form and detail, but strive to be a lawyer. 10. Always be straightforward and sincere. 11. Never fail in an engagement made, and observe rigid punctuality. Therefore be slow to promise, unless it is clear that you can punctually fulfill."

Let us now turn to the private diary of Lord Clonmell, which has escaped the flames which he desired to be the fate of all his papers, and was published some years ago by the late Mr. W. I. Fitzpatrick.

"Save," writes Lord Clonmell, "every moment for employment. Use everybody for your own purpose. All men will injure or deceive you. Watch the whole world—as this moment your friends, the very next your enemies. Offend none, serve others sparingly; conceal your dislike universally. Flatter all through. Every moment affords an opportunity of serving yourself, and act up to it. Use your actual situation, and never speculate or muse. Look intently at what is before you. Look on; listen forever when you are not speaking, and, when you are, strive every instant to excel. Let your discipline be inflexible in pursuit of your own advantage, entertainment, and praise, and so ever do your business in comedy. Keep an unalterable coolness, smile, and presence of mind. Never, never suffer any man or anything to put you off your guard, out of humor, out of spirits. Make yourself pleasing by flattering all. Make every man your dupe by flattery."—

Fitzpatrick's Ireland before the Union, pp. 24, 25.

With the U. S. Marine Corps. "Could you lick a postage stamp?" Sergeant George B. McGee, recruiter for the United States Marine Corps, standing in the lobby of the Buffalo postoffice watching for "prospects," turned about angrily at this slur on his fighting ability, only to face a heavily veiled woman carrying parcels under each arm. The woman went on to say that she would have to raise her new-fangled veil to do it herself, and would the sergeant oblige? So the sergeant gallantly obliged, and licked not only one, but several stamps, and placed them on the parcels she was carrying.

"The United States Marine Corps is prepared for anything," McGee later explained, "even to licking stamps for fair damsels in distress."

. . . . . .

Is there a law in this land of the free that will permit a father to force his minor son into the United States Marine Corps against that son's will?

A Milwaukee father says there is, and Sergeant Ansell M. Stowe, in charge of the United States Marine Corps recruiting station, is equally positive that there is nothing on the statute books covering a case of that sort.

The father literally dragged his nineteen-year-old son to the Milwaukee recruiting station, and demanded that the boy be enlisted. But the youth tearfully protested at what he seemed to think was a "high-handed outrage," and in Sergeant Stowe he found a sympathetic friend.

"I can't enlist the boy unless he is willing to join," Stowe told the father.

"What's the boy got to do with it anyway? I'm his father, and if I say he's got to enlist you've got to make him, and that's all there is to it. He's a worthless hound on the farm, and I want you to take him and make a man of him," the elder hotly replied.

But Sergeant Stowe refused to enlist the boy, and the parent left the recruiting office, vowing to return when he had consulted his attorney.

Up to the Judge. We are indebted to L. W. Smith, of Topeka, for the following anecdote:

In one of the western counties of Kansas, a colored man charged with violation of the prohibitory liquor law, under the advice of his attorney, had decided to plead guilty of the offense.

"What have you to say with reference to the charge brought against you?" asked the judge.

"Wall, Jedge," and he scratched his head as he waited before speaking further—"wall, Jedge, I don't know as it makes much difference what I got to say, it's what you got to say, Jedge."

Wise Precaution. There was no doubt about it, Michael Muldoon had lost his £5 note. How, then, was he to get back to Dublin?

But, sure, the London police would find it for him! Into a station marched Michael, and told his sad story to the sergeant.

The officer was inclined to be sympathetic.

"I suppose you wrote down the number of the note?"

"And Oi did that, sorr," said Mike, proudly.

"And what is the number, then?"

"And isn't that just what I don't know myself?"

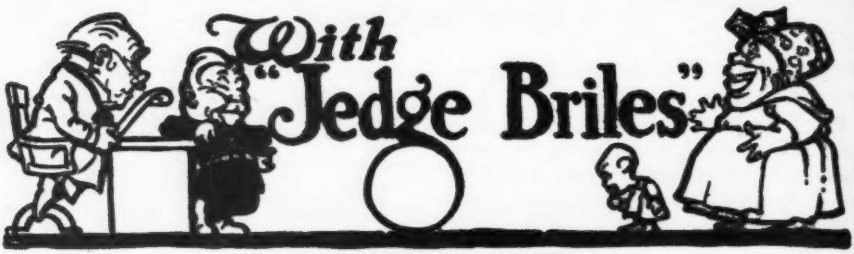
"But you said you wrote it down," exclaimed the officer, testily.

"That's the worst of it. I wrote it on the back of the note."—Answers.

Clear to the Writer. In "My Varied Life," F. C. Phillips, tells an amusing story of the English judge, the late Sir George Honyman, who wrote a wretched hand. On one occasion Sir George sent a note to a friend among the lawyers seated at the barristers' table.

Not being able to make head or tail of it, the friend scribbled something absolutely undecipherable upon a half sheet of note paper, and passed it up to the judge. Sir George looked somewhat annoyed when he glanced at it, but when the court rose he spoke to his friend, and said, "What do you mean by this? I asked you to come and dine with me tonight."

"Yes," said the barrister, "and I replied that I should be extremely glad to do so."



BY W. LIVINGSTON LARNED

(Note.—Perhaps the most famous judge in the whole South presided in an Atlanta, Georgia, court, where dozens of cases came up daily. He was lovingly known as "Jedge Briles" by his ever-changing audience, and while it was his stern mission and duty to administer punishment, as well as justice, erring ones were devoted to him just the same. Judge Broyles' court is rich in stories, and it is from this picturesque source that a countless number of thoroughly authentic anecdotes have come. Judge Broyles is now a member of the court of appeals).

The Judge Meets His Match. "You are Henry Jackson?"

"It's me, yo' Honah."

"Waiter?"

"Yas-suh."

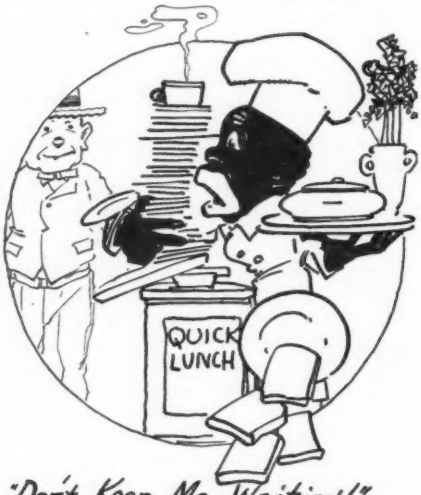
"In a railroad depot?"

"Yas-suh."

"You are located at one of the quick-lunch counters?"

"Yas-suh."

"The officer tells me that in a fit of



"Don't Keep Me Waitin'!"

temper—the most violent sort of temper—you smashed a plate over the head of a customer—this complainant here?"

" 'Spec' I did, Jedge."

"Do you realize how serious an act this was?"

"Well suh, Jedge, I'd do hit agin if dat po' white trash Cracker said de' same words."

"What did the complainant say, Henry?"

"Jedge, he jumped off a train an' come in, all puffin' an' a-blowin'. 'Hungry, nigger, hungry,' he say, 'cook me som' fried chicken, roas' sweets, corn fritters, stewed termatters, hominy, plate ob special beef soup, buttered toas', pot ob coffee, an' two biled eggs.' "

" 'How long is yo' got ter eat it in?' I ax' him."

" 'Don't keep me waitin', nigger,' he sez, 'mah train pulls out in two an' a half minits.' Den I walloped him, Jedge."

Shall the Court Rule on Religion. The woolly-headed Uncle Rasmus was

"Waving His Arms, and Yelling:"

accused of disturbing the peace. Officer Mort Rudolph explained it as follows:

"Your Honor, this man was running up and down the Mill River road, waving his arms and yelling at the top of his voice, and otherwise raising the mischief, at half-past one in the morning. The people of that district complained, and they had a perfect right to."

The judge frowned at Rasmus, who didn't seem to be particularly worried.

"What do you mean by such unbecoming conduct?" his Honor demanded.

"Religion, Jedge," was the response.

"Religion! Are you a Holy Roller, or something like that? I have religion, Rasmus, but I don't get up at midnight and tell everybody about it."

"Dat's des' de diffunce, Jedge. I ain't ershamed ob mine."

Mammy Wasn't Educated in Law. "Mammy" Washington seemed very ill at ease in court. She admitted to the judge that it was her first time on "poleeceman ground." Considerable difficulty was experienced in making her answer questions. She would go just so

"I is ME - But Yo' isn't YOU!"

far and then stop, all a-fluster.

The judge hit upon a scheme.

"There is no need for you to be excited, Mrs. Washington," he said, with a smile. I'm just a judge and you are just you."

At last the old negress found her tongue.

"Dat's jes' hit, suh," she cried, explosively, "I is ME, but yo' isn't YOU, in dem spec's, and wid dat crokay mallet in yo' han'. Ef yo' could fix hit fer to talk dis over in a kitchen, I'd be all right, jedge!"

His Private Opinion of Lawyers. "If you feel that way about it, Henry Martin," said the judge, "I suggest that you hire a lawyer to present your arguments. Otherwise all this might happen again. Do you know any lawyers?"

"Does I, jedge! Humph! I works in a buildin' whar dey's twenty uv um. Dat's why I'm stayin' neutral, yo' Honah!"

His Honor Secures Face-value Proof. A vinegary, middle-aged woman was brought before the judge, her second husband having caused the arrest. Incompatibility and rough use of a frying pan were mentioned in the case.

"Your Honor," said the wisp of a little farmer, "she's rough and jes' argues, an' argues an' argues, 'till I don't git no rest nights. If it wasn't fer no other reason, I'd like to be free uv her on th' grounds uv talkin'."

The vinegary one bristled with anger.

"Just a word, judge," she broke in; "everybody in my neighborhood knows I'm a quiet, self-respecting woman, with very few words to say, and when I DO talk, I don't say nothing much, an' furthermore, I don't come of a family of talkers,—nobuddy in our ancestors was given to talkin' and if I do decide to say somethin' there must be a reason fer me talkin', and as for that little pickle havin' the audacity to say that I talk, well—I want to say this, judge—I—"

At this moment her husband interrupted.

"Your Honor, don't be inflooenced against me by what she's sayin' NOW. She can't talk in front of strangers."

How Officer Flynn Drew the Color Line. "Henry, this makes the tenth time in two weeks you've been before this court. I've been lenient with you up to date. I'll have to change. This thing

can't go on indefinitely. Officer Flynn, what has Henry been doing?"

"Loafin' in front of McHenry's feed store, and causing annoyance."

"Why didn't you tell him to move on?"

"I did, your Honor. That nigger talked back. Finally he resisted arrest, and I brought him here."

"De Sight ob Black Made Him Mad."

The court remains neutral for a moment or two. Finally—

"Henry."

"Yes-suh, jedge."

"If what the officer says is true—and I have no reason to doubt it—I guess I'll have to send you away for a while."

"Dat man pesticates me outern meanness, jedge, hones' he does."

"Do you mean to intimate that he is prejudiced because of your color?"

"Somethin' laik dat, jedge. I hear'n him say to Mistuh Hicks wunct dat des' de sight ob black made him mad ter start wid, an'—an'—yo' kin see fo' yo'sef, jedge, dat I leans ter dark chocolate mo' dan head-waiter buff."

Why He Yielded. "Jim Jackson?"

"Dat's me, yo' Honah."

"You are accused of stealing a load of coal from the freight yards."

"Circumstancus evydence, jedge."

"You are NOT guilty?"

"No, suh."

"Then why did you stand there by the cart when Officer McFlynn ran up . . . why didn't you go on about your business? This court holds it was very suspicious that you did not walk away from the yards, under the circumstances."

"Yo' Honah, ef yo' had mah pair ob foots yo' wouldn't run erway, not eben ef yo' wuz accused ob breakin' in a bank."

"Ten Days and Costs" Seemed Fair. "Jim Wilson."

"Yes sir."

"You are a farmer from the Marietta Section?"

"That's right, yore Honor."

"You are down on the court records for breaking a watermelon over the head of Ligus Harvey, colored, and firing two loads of buckshot at him. I think ten days and costs would be light for an offense of that sort, but I'm willing to hear you—what have you got to say?"

"Well, Judge, yo' oughter know more about it than me, as I'm not in th' business reg'lar, but if yo' want my *honest* opinion, I think yo' is a trifle high, as th' market goes."

His Trade Belied His Court Record. The grizzled colored man, with ragged clothes and a forlorn expression, was up before the judge for the eleventh time. On each occasion he had put such good stories before his Honor that he had been allowed to go on parole.

"What is it now, Uncle Jerry?" the judge demanded sternly.

"Jes' plain drunk, yo' Honah!"

"What! I never knew you to be arrested for drinking before," exclaimed the court.

"I lets de stuff erlone, mos' genally, Jedge."

"But what made you fall this time?"

"I los' mah job at de cannin' works, an' I done run away wid a barber from Macon, Georgia."

"What is your regular business, Uncle Jerry?"

"Well, yo' Honah, I sells lucky beans!"

New Books & Periodicals

Learning by study must be won;
'Twas ne'er entail'd from son to son.—Gay

"Americanism: What it is." By David Jayne Hill, LL.D. (D. Appleton & Co., New York.) $1.25 net.

The writer tells us "this book is intended to set forth as clearly as possible what is most original and distinctive in American political conceptions and most characteristic of the American spirit." It delineates the American conception of the state; considers the present crisis in American constitutionalism; points out the tests of American democracy; treats of Americanism and world politics; urges the duty of national defense and discusses the new perils for Americanism.

Dr. Hill's literary style is delightful, and he presents his opinions with entertaining and forceful eloquence. His former position as ambassador to Germany renders of great weight his views as to our need of a definite foreign policy and as to what position the United States should take to-day in connection with the European War.

It would be well if a copy of this book could be placed in the hands of every young man in America.

"The American Plan of Government." By Charles W. Bacon. (G. P. Putnam's Sons, New York.) $2.50 net.

The aim of the writer of this volume is to present the facts in the more important cases in which our courts have given decisions upon points involving the interpretation and explanation of the provisions of the Constitution of the United States.

In the introduction to the work by Mr. George Gordon Battle the purpose of the volume is admirably stated: "The story of the origin of the Constitution and of its interpretation by the courts is told in 'the American Plan of Government.' This book shows how a plan of government adopted 127 years ago to give the people of thirteen little Republics a central government strong enough to protect them from internal dissension and foreign aggression has been found sufficient for the management of the business of the nation which uses commercial and industrial machinery not dreamed of in the constitution-making era. No similar book is in existence."

"This book gives the reader the real meaning of the Constitution, a meaning which cannot be obtained by reading the original document, because a collection of rules cannot be understood except by reference to cases in which they have been enforced."

"War or a United World." By Soterios Nicholson. (The Washington Publishing House, Washington, D. C.)

The first seven chapters of Mr. Nicholson's work are devoted to a survey of the history of European wars from the earliest times. He believes that very often wars have been waged for no valid reason whatever, but have rather been the ruthless games of Kings, resulting in the destruction of the vital energies of nations.

A chapter is devoted to the causes of the present war in Europe. In this connection he discusses Franco-German rivalry, Anglo-German rivalry, Slav-Teutonic rivalry, the growth of the German Empire and the "Near Eastern" question.

The concluding portion of the work treats of "Peace with Justice," and urges the promotion of a sense of solidarity among the nations the outcome of which it is hoped will be a United States of the World. The author thoughtfully discusses the nature of the best Constitution of the nations, considers the mutual relationship of men and of groups of men, and earnestly aims to discover the means which will control, and, if possible, put an end to war.

"Toward the Danger Mark." By Cairoli Gigliotti. (Published by the Author, 105 W. Monroe St., Chicago.) $2.00.

It is the purpose of the author of this book to point out what he believes to be deficiencies in the administration of justice in the United States, and to propose remedies for their correction. He does not hesitate to criticize many things pertaining to the prevailing system. He urges, among other measures, the examination

and licensing of lawyers by a national board, a reduction in the number of courts, and added care in the selection of judges and prosecuting attorneys.

Huddy on Automobiles, 4th ed. 1916, $5.50.

Berry on Automobiles, 2nd ed. 1916, $6.50.

Titles to Real Property, by Ralph W. Aigler, 1 vol. 1916, $5.00. About 100 pages (West).

The Law of Interstate Commerce, by Frederick N. Judson, 1 vol. 1100 pages. Buckram, $7.50.

California Citation Manual and Legal Reference Book, 1 volume, 950 pages. Buckram, $5.00.

Remington's 1915 Washington Codes and Statutes, 2 volumes, 4300 pages. Buckram, $10.00.

Recent Articles of Interest to Lawyers

Arbitration.

"A Review of Some of the World Court Decisions."—11 Illinois Law Review, 91.

"Specific Performance of Contracts for Arbitration or Valuation."—1 Cornell Law Quarterly, 225.

Attorneys.

"The Remedy for the Unauthorized Use of an Attorney's Name."—27 American Legal News, 9.

"The Section of Legal Education of the American Bar Association."—4 American Law School Review, 119.

Automobiles.

"Responsibility for Automobile Accidents."—11 Bench and Bar, 9.

"Rights and Duties of Automobile Driver When Meeting and Passing Horse-Drawn Vehicles."—2 Virginia Law Register, 81.

Banks.

"Liability of National Bank Directors."—33 Banking Law Journal, 341.

"Modern Banking and Trust Company Methods."—33 Banking Law Journal, 381.

"The Law of Banking."—33 Banking Law Journal, 389.

Biography.

"Abraham Lincoln."—23 Case and Comment, 106.

"Alexander Hamilton."—23 Case and Comment, 114.

"A Roman Advocate (Cicero)."—23 Case and Comment, 131.

"Daniel Webster, The Constitutional Lawyer."—23 Case and Comment, 97.

"John Marshall."—23 Case and Comment, 127.

"John Marshall Harlan."—23 Case and Comment, 120.

"Lord Stowell; Greatest Prize Court Judge."—23 Case and Comment, 102.

"Robert E. Lee Saner."—23 Case and Comment, 170.

"Roscoe Pound."—23 Case and Comment, 167.

"The Greatest American Lawyer (William Pinkney)."—23 Case and Comment, 87.

"The Legal Career of Patrick Henry."—23 Case and Comment, 109.

"Thomas Wall Shelton."—23 Case and Comment, 164.

Bonds.

"Municipal Bonds."—33 Banking Law Journal, 348.

Collections.

"Collections from the Lawyer's Standpoint."—27 American Legal News, 23.

Constitutional Conventions.

"The Powers of Constitutional Conventions."—9 Lawyer and Banker, 148.

Constitutional Law.

"The Boundaries Between the Executive, the "Legislative and Judicial Tendencies in the Government."—25 Yale Law Journal, 599.

Contracts.

"Teaching Contracts With the Aid of Problems."—4 American Law School Review, 115.

Corporations.

"Digest of the Foreign Corporation Laws of Alabama."—27 American Legal News, 13.

Criminal Law.

"An Outline of English Criminal Procedure."—4 American Law School Review, 131.

"Legisaltive and Judicial Tendencies in the Field of Criminal Law."—11 Illinois Law Review, 69.

"Physical Crimes of the Alcoholic."—9 Lawyer and Banker, 143.

"Review of the Work of the English Court of Criminal Appeals."—7 Journal of Criminal Law and Criminology, 17.

"The Alcoholic As Seen in Court."—7 Journal of Criminal Law and Criminology, 89.

"The English Prison System and What We Can Learn From It."—7 Journal of Criminal Law and Criminology, 22.

"The First Reported Criminal Trial."—7 Journal of Criminal Law and Criminology, 8.

"Why Witnesses Fail to Identify Criminals."—27 American Legal News, 11.

Evidence.

"Reforms in Rules of Evidence."—9 Maine Law Review, 185.

Fiction.

"The Legal Bookworm."—23 Case and Comment, 140.

"The Thorn Mortgage (a Law Story)."—27 American Legal News, 15.

Incompetent Person.

"A Police Psychopathic Laboratory."—7 Journal of Criminal Law and Criminology, 79.

"A Psychological Basis for the Diagnosis of Feeble-Mindedness."—7 Journal of Criminal Law and Criminology, 32.

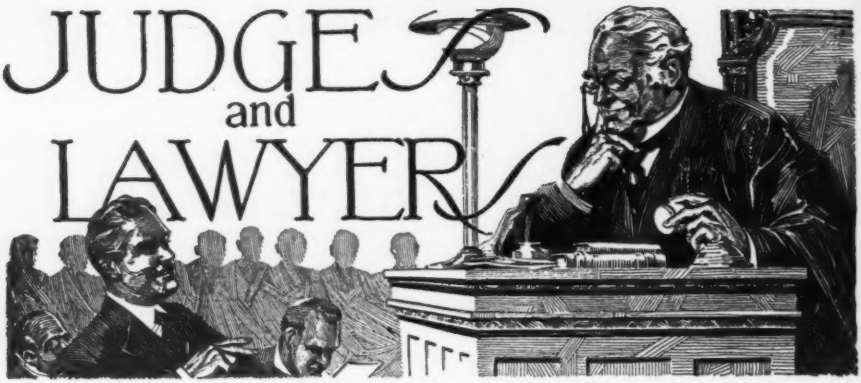
"Medico-Legal Aspect of Mental Deficiency."—33 Medico-Legal Journal, 7.

"Who is Feeble-Minded?"—7 Journal of Criminal Law and Criminology, 56.

Insurance.
"War Perils and 'Restraint of Prices.'"—51 Law Journal, 247.
International Law.
"The Outlook for International Law."—4 American Law School Review, 124.
Law and Jurisprudence.
"The Development of Administrative Law in the United States."—25 Yale Law Journal, 658.
"The Law of Nature in State and Federal Judicial Decisions."—25 Yale Law Journal, 617.
Law Reform.
"Judicial Reform Must Begin in the Trial Court."—82 Central Law Journal, 388.
Libel and Slander.
"Some Twilight Zones in Newspaper Libel."—1 Cornell Law Quarterly, 238.
Lottery.
"Advertising Schemes and the Lottery Law." 82 Central Law Journal, 398.
Marriage.
"The Present Status of the Illinois Law Governing Marriage After Divorce."—11 Illinois Law Review, 103.
Practice and Procedure.
"The Problem of Reforming Judicial Administration in America."—3 Virginia Law Register, 598.
Prize.
"Is Cotton Contraband?"—25 Yale Law Journal, 666.
Real Property.
"Land Titles—A Vital Factor."—9 Lawyer and Banker, 166.
"The History of a Title."—4 American Law School Review, 145.
Release.
"Releases of Rights of Action Accruing Under the Federal Employers' Liability Act."—82 Central Law Journal, 370.
Specific Performance.
"Specific Performance of Contracts for Arbitration or Valuation."—1 Cornell Law Quarterly, 225.
Submarines.
"Should the Submarine be Used in Warfare Upon Commerce."—3 Virginia Law Review, 573.
Taxes.
"Inheritance Tax on Non-Resident Estates." 22 Trust Companies, 465.
War.
"Financial Legacy of European War."—22 Trust Companies, 459.
"Should the Submarine be Used in Warfare Upon Commerce."—3 Virginia Law Review, 573.
Wills.
"'Issue' Meaning 'Children.'"—141 Law Times, 40.
"Testamentary Incorporation by Reference."—3 Virginia Law Review, 583.
Witnesses.
"Success in Cross-Examination."—11 Bench and Bar, 17.
Workmen's Compensation.
"Some Aspects of Compensation Administration."—9 Maine Law Review, 197.

The Joy of the Thinker

No man has earned the right to intellectual ambition until he has learned to lay his course by a star which he has never seen,—to dig by the divining rod for springs which he may never reach. In saying this, I point to that which will make your study heroic. For I say to you in all sadness of conviction, that to think great thoughts you must be heroes as well as idealists. Only when you have worked alone,—when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying man, and in hope and in despair have trusted to your own unshaken will,—then only will you have achieved. Thus only can you gain the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought,—the subtile rapture of a postponed power, which the world knows not because it has no external trappings, but which to his prophetic vision is more real than that which commands an army. And if this joy should not be yours, still it is only thus that you can know that you have done what it lay in you to do,—can say that you have lived, and be ready for the end.—Hon. Oliver Wendell Holmes.



A Record of Bench and Bar

Mr. Justice Brandeis—New Associate Justice of the United States Supreme Court

EVERY available seat in the court room of the United States Supreme Court was occupied at noon on June 5, when Louis D. Brandeis, of Boston, took his seat on the bench as an associate justice of that august tribunal. The pressure for admission into the historic court chamber was so great, in fact, that the court attendants waived the ordinary rules and permitted scores to stand in the aisles. Members of both houses of Congress, other public men, prominent members of the bar, and members of the family of Mr. Brandeis, were present.

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The ceremonies, states the New York Times, were the same as those by which the predecessors of Mr. Brandeis on the supreme bench have been installed and sworn for many years past. Before the court members filed into the court room they assembled in the robing room, where Chief Justice White administered the oath of allegiance to the Constitution. Only members of the court witnessed this part of the ceremony, which

took place just before noon. Then, donning his robe, Mr. Brandeis walked last in the line of members of the bench as they proceeded into the court room on the stroke of noon.

Chief Justice White, rising, announced the appointment of Mr. Brandeis, and, stating that he was present, directed the clerk of the court to read the commission of the new associate justice. Justice White then announced the readiness of Mr. Brandeis to take the judicial oath, which was administered, the response by Mr. Brandeis being as follows:

"I, Louis D. Brandeis, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; that I will faithfully and impartially discharge and perform all the duties incumbent upon me as associate justice of the Supreme Court of the United States according to the best of my abilities and understanding."

Justice Brandeis was then escorted by Frank Key Green, the marshal of the court, to his seat on the extreme left of the bench. Members of the court bowed as he passed. After receiving the congratulations of the justice nearest him, Mr. Justice Pitney, of New Jersey, who shook hands with him, Mr. Brandeis took his seat.

The new justice was born sixty years ago in Louisville, Kentucky, graduated from Harvard University in 1877, and began the practice of law in Boston after admission to the bar in 1878. He has been chiefly noted for his arguments before the Interstate Commerce Commission in opposition to the requests of the railroads that they be allowed to increase their freight rates, appearing as counsel for shippers fighting the increased rates, although he also opposed the New Haven monopoly of transportation in New England, and served as counsel for individuals in proceedings involving the constitutionality of women's ten-hour labor laws in Oregon and Illinois and a nine-hour law in Ohio.

He took part in the fight in the city of Boston to retain the municipal subway system, in establishing a sliding scale gas system in Boston, and was chairman of the arbitration board in the New York garment workers' strike in 1910. He also played a celebrated part as counsel for Mr. Glavis in the Ballinger-Pinchot investigation, and has been the author of numerous articles on public franchises in Massachusetts, life insurance, wage-earners' problems, the scientific management of labor problems, and the trusts.

Justice Brandeis received more than 200 telegrams during the day from prominent men in various parts of the country, and some from abroad, congratulating him upon taking his seat as a member of the country's highest court, and wishing him a long and successful career as a jurist.

Herman Bernstein, editor of the American Hebrew of New York, received the following cable from Lord Reading, Chief Justice of England, commenting on the appointment of Louis D. Brandeis as an associate justice of the Supreme Court of the United States:

"Membership of the Supreme Court of the United States is one of the greatest distinctions known to the legal world, and I heartily congratulate the new associate justice.—Reading, Chief Justice of England."

"Lord Reading," observes the Boston Transcript, "was, before his elevation to the peerage, Rufus Daniel Isaacs, attorney general, and he is the son of Joseph M. Isaacs, a Jewish merchant of London.

"Immemorially gifted with the qualities which make great lawyers and judges, the Jewish race is now represented upon the highest courts of the two great national branches of the Anglo-Saxon peoples. When the Chief Justice of England, therefore, sends his congratulations to the new associate justice of the United States, it is Jewish legal lore in the old world felicitating the new world's recognition of the same race talent.

"Lord Reading is one of the ablest of English lawyers, and, like Justice Brandeis, he is inclined to the liberal view of public affairs and of social questions." It is certain that he will dignify the bench by his ability and learning and his first-hand knowledge of the great sociological problems that are now confronting us.

Rome G. Brown

Chairman American Bar Association Committee to Oppose Judicial Recall

BY HUGH H. BROWN

Of the Tonopah, Nevada, Bar

THE public and professional activities of Rome G. Brown, of Minneapolis, have attracted nation-wide notice during the past few years. As chairman of the American Bar Association's committee to oppose the judicial recall, he has, since 1911, planned and conducted an aggressive anti-recall campaign throughout the country. In the prosecution of this work he has delivered a score or more of addresses before state bar associations, law schools, universities, and business men's clubs, and other organizations, and has debated the question on several public occasions with advocates of the judicial recall. In this work he has traveled over 30,000 miles. Under his direction there have been printed some thirty different pamphlets which have been distributed as educational propaganda on the question throughout the United States. The circulation of such pamphlets exceeds a total number of 700,000. He has also conducted campaigns before various legislatures and electorates where the question was acutely at issue. The fact that in the United States the judicial recall is now a waning, and, indeed, a dead, issue, is largely credited to Mr. Brown's tireless and effective labors.

William H. Taft, delivering his address as president of the American Bar Association, at the annual session in Washington in October, 1914, said: "This association four years ago appointed a special committee to oppose the judicial recall, and that committee has done great work. Its present chairman, Mr. Rome G. Brown, of the Minneapolis Bar, has delivered effective addresses to many state bar associations throughout the country, and has encouraged legislative opposition in many states to the embodiment of these heresies in statutes. The report of the committee shows that there has been a distinct falling off in the support of these fundamentally unwise and dangerous proposals."

Referring to Mr. Brown's latest summary of the status of judicial recall, the "New York Nation" in its issue of July 6th, last, says: "Not only is the recall of judges dead as a doornail; in the latest report of the American Bar Association's committee on the subject, it is asserted that movements for getting rid

of the recall in the six states which adopted it are gaining force."

"Leslies' Weekly" in its issue of July 20th, last, says: "The change has been effected largely by the organized teaching of the necessity of constitutional limitations, and of their enforcement by the exercise of the judicial function, to which the judicial recall, in both its forms, is repugnant. This has been one of the labors of the American Bar Association, through its committee to oppose judicial recall, composed of a member from each state, under the energetic chairmanship of Rome G. Brown, of Minneapolis. The annual report of this committee, just published, shows the result of persistent and effective work in combating the advocacy of this socialistic doctrine. The change has come through an enlightenment of the people as to the subversive nature of the proposition that either the tenure of judges or their decisions should be subject to the temporary or local whim of majorities. . . . "The subsidence in this country of this fallacy to its original socialistic source is due to the application of the only cure for distorted views of government. It is due to that remedial specific for socialism itself,—education."

In legal circles Mr. Brown is known as a leading national authority on the law of water rights, and particularly on Federal water-power legislation. Many of his discussions of water-rights and water-power law have been published; and he is lecturer on the subject of water rights in the law schools of the University of Minnesota and of the University of North Dakota.

He has also become a prominent authority on the subject of the statutory minimum wage, of which he is a pronounced opponent, both upon economic and constitutional grounds. In the Oregon minimum wage cases (Stettler v. O'Hara and Simpson v. O'Hara), he appeared December, 1914, before the United States Supreme Court in opposition to the constitutionality of these statutes. In this argument he was opposed by Louis D. (now Justice) Brandeis. No decision has yet been filed, and the Oregon cases have been set for reargument next fall. Mr. Brown is the author of a published discussion entitled "The Minimum Wage." Discussions by him of the same subject have been printed at various times, including one in the September, 1915, number of "Case and Comment."

To Mr. Brown is also credited the successful outcome in his recent contest for the constitutional right of a private trader to refuse to sell any customer for any reason whatever,—despite the former Federal decisions prohibiting price maintenance as repugnant to the anti-trust acts. This establishment of the right to refuse to sell was an epoch-making event in the law of trade relations in this country. Great Atlantic & P. Tea Co. v. Cream of Wheat Co., decision by Judge Lacombe, of the United States Circuit Court of Appeals, Second Circuit, filed November 10, 1915, 141 C. C. A. 594, 227 Fed. 46, affirming decision by Judge Hough of the United States District Court, Southern District of New York, 224 Fed. 566.

He is in general practice and represents a large and important clientele.

He was born in Montpelier, Vermont, June 15, 1862; graduated from Harvard in 1884 with *magna cum laude;* was admitted to the bar in Vermont in 1887, and removed to Minneapolis the same year. He is vice president and general counsel of the Minneapolis Tribune Company; general counsel of the Cream of Wheat Company, the Minneapolis Water Power Companies, and other corporations. He is chairman of the Minnesota State Board of Commissioners on Uniform State Laws, and was vice president of the National Conference of Commissioners on Uniform State Laws in the year 1913. He was a member of the executive committee of the American Bar Association from 1906 to 1909, and president of the Minnesota State Bar Association in 1906 and 1907. He is active in the alumni activities of Harvard, having been president of the Minnesota Harvard Club in 1907, and president of the Associated Harvard Clubs of the United States in 1906. He is senior member of the firm of Brown & Guesmer, Minneapolis.

Trinity and Dr. Black

It is worthy of note that the degree of doctor of laws was conferred by Trinity College (Conn.) on the eminent American legal writer, Henry Campbell Black, of Washington, D. C. Dr. Black's legal works cover many subjects and are extensively used by the profession.

In conferring this honorary degree Trinity College has honored one of her own sons and graduates, and recognized the value and utility of a life devoted to the study of legal problems and the preparation of editorials and treatises.

Death of Omaha Attorney

William A. De Bord, president of the Omaha Bar Association, died a few weeks since, following an operation for abscess of the brain.

From inmate of an orphans' home at Glenwood, Iowa, where Billy Sunday also spent his boyhood days, to a position as one of the foremost lawyers of Nebraska, was the life history of Mr. De Bord.

He was born on a farm near Oskaloosa, Iowa, January 4, 1865. His father was killed in Sherman's march to the sea during the Civil War, and never saw his son.

Upon leaving the orphanage Mr. De Bord undertook to educate himself. He "worked his own way" through the college and law departments of Iowa University, then went to York, Nebraska, to begin practice. Within a year he was in Omaha and rapidly climbed to the front rank of lawyers.

Mr. De Bord was a member of the law firm of De Bord, Fradenburg, & Van Orsdel. He was president of the Child Saving Institute, was for a number of years prominent in Masonry of the state, and was a member of the Omaha Commercial Club, University Club, First Christian Church, and Y. M. C. A.

Decease of Justice Blanchard.

James Armstrong Blanchard, who retired from the Supreme Court bench with the first of the year, died on July 9, at the age of seventy-one.

He entered the Columbia Law School and supported himself while studying there by teaching. He was graduated in 1873 with the degree of LL. B. In 1902 he received the degree of LL. D. from Ripon College.

For several years he practiced law and became head of the firm of Blanchard, Gay & Phelps.

In 1899, Governor Roosevelt appointed him a Judge of General Sessions and he served for one year. In September, 1900, Governor Roosevelt appointed him to the Supreme Court and a little more than a year later, in November, 1901, he was elected for the full term, expiring on Dec. 31, 1915.

In addition to his legal activities, Justice Blanchard was prominent for his interest in civic betterment.

Our Soldier Boys

The recent mobilization of the National Guard summoned to the colors Lieutenant Benjamin R. Briggs, Advertising Manager of the Lawyers' Co-operative Publishing Company and Business Manager of CASE AND COMMENT. Lieutenant Briggs has for several years been an active member of Troop H, First Cavalry, which he aided in organizing. He has just been assigned to the duties of adjutant of his regiment and will be attached to the headquarters staff.

Sergeant William W. Ackerly of Troop H, First Cavalry, now in Texas with his regiment, has for several years been a member of the editorial staff of the Lawyers' Co-operative Publishing Company, and engaged in the preparation of L.R.A. notes.

When Uncle Sam no longer needs them, we shall be glad to have them back with us.

Word has just reached us that Mr. William W. Brewton, whose Philosophic Essays on Law have appeared from time to time in CASE AND COMMENT, is in camp with Company A, Fifth Infantry, of the Georgia National Guard.

Witnesses like watches go just as they're set; too fast or slow.—Butler

Too Personal. A witness was examined before a judge in a case of slander, who required him to repeat the precise words spoken. The witness, fixing his eyes earnestly upon the judge, began: "May it please your Honor, you lie, and steal, and get your living by cheating." The face of the judge reddened, and he exclaimed, "Turn your head to the jury when you speak."—Wit and Wisdom.

A Dangerous Question. "In court-martial trials in our Army," says an officer on duty in this state, "the attorneys are selected from the officers at the post without reference to their legal training or their ability to handle a case.

"A young surgeon, whose ignorance of law was complete, found himself appointed counsel for the defense at his new post, and when he entered the court his only legal knowledge was that he had a right to 'object' to the tactics of the other side. When, therefore, one of his witnesses was placed under cross-examination, the lawyer-surgeon sprang to his feet and shouted lustily: 'I object!'

"'On what grounds?' demanded the prosecuting attorney.

"'On what grounds?' repeated the surgeon. 'On very good grounds. Why, if my witness tells the truth when he answers that question, it will ruin my case!'"

Out of Abundant Caution. There is a property owner in Pennsylvania who has endeavored to inculcate in his tenants the principle of arbitration with reference to their disputes, offering himself as arbiter.

On the occasion of the last dispute of this sort, the owner, before undertaking a solution, put to one tenant the usual question:

"Now, William, if I consent to arbitrate, will you abide by my decision?"

William hesitated a moment, then said: "Well, sir, I'd like to know what the decision is first."

Doubtful Location. During an inquest held in Cincinnati the following question was put to one of the witnesses by the deputy coroner:

"Where was the deceased struck by the motor car?"

Whereupon the witness, a surgeon, replied: "At the juncture of the dorsal and cervical vertebræ."

The deputy coroner looked puzzled. "Will you please point out that on the map?" he asked, indicating one that hung on the wall.

The Point of View. "This man," exclaimed a lawyer during the course of a trial in the West, "is not insane, and never has been. To keep him in an asylum is a blow directed against human rights, an assault upon the sacred institution of liberty, and—"

"But," interposed the court, "did you not prove some weeks ago, when the defendant was on trial for murder, that he had been from birth an insane person?"

The lawyer smiled in a superior way. "Surely," he said, "your Honor would not have it believed that this court is on the intellectual plane of that jury."

One of the Guilty. Into a Chicago police court was haled a man charged with the theft of an umbrella.

"What have you to say for yourself?" asked the magistrate. "Are you guilty or not guilty?"

"Well, said the accused, "I guess I am one of the guilty parties, your Honor. The umbrella had the name of M. Barker on the handle, W. T. Morgan stamped on the inside of the cover, and I stole it from this man here, whose name is Higgins."

Unconscious Joker. What the case was about no one seemed to know exactly. The lawyers themselves were pretty well mixed up.

Then an important witness entered the box, and was presently asked to tell the court the total of his gross income.

He refused; the counsel appealed to the judge.

"You must answer the question," said the judge sternly.

The witness fidgeted about and then burst out with:

"But—but, your Honor, I have no gross income. I'm a fisherman, and it's all net."—Pittsburgh Chronicle Telegraph.

Trial by Jury. "Gentlemen of the jury, are you agreed upon your verdict?" asked the judge presiding over a Texan court.

"We are," responded the foreman.

"Do you find the prisoner guilty or not guilty?"

"We do."

"You do? Do what?" exclaimed the startled judge.

"We find the prisoner guilty or not guilty," answered the foreman.

"But, gentlemen, you cannot return a verdict like that."

"Wal, I don't know," the foreman responded. "You see, six of us find him guilty and six of us find him not guilty, and we've agreed to let it go at that."—Philadelphia Public Ledger.

Wanted the Facts. A big chap stood at the rail, completely swathed in bandages. One might say that little of his face was visible, aside from one eye that peered through an opening in the bandages.

"You are charged with disorderly conduct," said the court.

"So I understand," said the man at the rail. "And I want to be held for trial."

This was a decidedly unexpected announcement; and everyone in court was correspondingly astonished.

"I should think," said the court, after a moment's hesitation, "that you would plead guilty now, and pay a fine of $5, ending the matter."

"I thank your Honor," said the man, "but I want to be tried."

"Why?"

"For this reason," explained the mussed-up man. "The last thing I remember was that I was standing very peaceably on a street corner. When I came to, two doctors were busily engaged in sewing me together. I want to be tried so that I can hear the stories of the witnesses. That's about the only way I'll ever find out what came off."

The Unlucky Thirteen. They were speaking of the fatality that is supposed by some to hover over the numeral 13, the other evening, when William Faversham, the actor, recalled an incident along that line.

Recently a party of several people visited a big state penitentiary in the east. Among them was an elderly woman whose sympathy went out to one of the inmates.

"My poor man," said she, in a kind and gentle voice, "how in the world did you ever come to be in a place like this?"

"Couldn't help myself, lady," answered the inmate, with a sad sigh. "I stacked up against the unlucky number 13."

"You don't really mean it," exclaimed the visitor, who had all of the 13 superstition.

"Yes, lady," returned the inmate, with even a sadder sigh, "twelve jurors and one judge."—Worcester Post.